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Supreme Court of the United States

October Term, 1952
No. 591

MALLONEE, BUCKLIN and FERGUS, Shareholders' Protective Committee, and LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioners,

vs.

FAHEY, AMMANN, as Conservator, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Respondents.

Shareholders' Protective Committee's
and
Long Beach Federal Savings and Loan Association's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

PAGE

Opinions below 3

Jurisdiction 3

Jurisdiction of the District Court 5

Questions presented 6

Statutes involved 8

Statement 9

Specifications of error 22

Reasons for granting the writ 24

A. Public interest 24

B. Court of Appeals confuses executive with congressional agencies 27

C. Conflicts between United States Courts 31

I. Direct conflict between Court of Appeals and 1947 U. S. Supreme Court decisions in this case 31

(a) Can fraud be tried 31

(b) Right to amend denied 34

(c) Dismissal erroneously ordered 35

II. Direct conflicts between Court of Appeals' Opinions and other U. S. Supreme Court decisions 36

(a) On immunity to suit 36

(b) On no justiciable issue 37

(c) On waiver of immunity by "sue or be sued" 38

(d) On indispensable parties 39

(e) On dismissal for failure to complete administrative process 40

(f) On res judicata as to jurisdiction 43

PAGE

III. Direct conflicts between Court of Appeals for Second, Third, Seventh, and District of Columbia Circuits 45

IV. Direct conflicts between the Court of Appeals for the District of Columbia and the Court of Appeals for the Ninth Circuit 47

V. Direct conflicts between earlier decisions of the same circuit 48

VI. Direct conflict between two opinions of same Court of Appeals in the same cases 49

D. Conflicts between Court of Appeals' opinions and U. S. Statutes 51

I. Stay power of reviewing court nullified 51

E. $7,000,000.00 denied debt foreclosed without trial 53

F. Accounting prevented 55

G. Insurance of savings deposits nullified 56

Conclusion 57

TABLE OF AUTHORITIES CITED

CASES	PAGE
Baldwin v. Iowa Traveling Men's etc., 283 U. S. 522, 75 L. Ed. 1244	44
Barber Asphalt Corp. v. La Fera, etc., 116 F. 2d 211	45
Dugas v. American Surety, 300 U. S. 414, 81 L. Ed. 720	44
El Dorado Oil Works v. United States, 328 U. S. 12, 90 L. Ed. 1053	41
Fahey, et al. v. Mallonee, et al., 332 U. S. 245, 91 L. Ed. 2030	4, 10, 18, 24, 27, 31, 33, 53
Fahey, Ex parte, 332 U. S. 258, 91 L. Ed. 2041	4, 10, 17, 18, 24, 27, 31, 32, 33, 35, 53
Far East Conference v. United States, 342 U. S. 570, 96 L. Ed. (Adv. Ops. No. 10) 390	40
Federal Housing Administrator v. Burr, 309 U. S. 242, 84 L. Ed. 724	39
General Amer. T. Car Corp. v. El Dorado Term. Co., 308 U. S. 422, 84 L. Ed. 261	41
Hynes v. Grimes Packing Co., 337 U. S. 86, 93 L. Ed. 1231	40
Isenberg v. Biddle, 125 F. 2d 741	46
Joint Anti-Fascist v. McGrath, 341 U. S. 123, 95 L. Ed. 817	37, 38
Keifer v. Reconstruction Finance Corporation, 306 U. S. 381, 83 L. Ed. 784	39
Land v. Dollar, 330 U. S. 731, 91 L. Ed. 1209	36
Lion Mfg. Corp. v. Chicago Flexible etc., 106 F. 2d 930	46
Mallonee, et al. v. Fahey, et al., 68 Fed. Supp. 418	15
Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 319	42
Public Service Commission of the State of Missouri v. Brashear Freight Lines, Inc., 312 U. S. 621, 85 L. Ed. 1083	47
Railway Express v. Jones, 106 F. 2d 341	46

PAGE

Reconstruction Finance Corporation v. Menihan, 312 U. S. 81, 85 L. Ed. 595 39
S. S. W. v. Air Transport, 191 F. 2d 658 47
San Diego Flume Co. v. Souther, 90 Fed. 164 46
Scripps-Howard v. Fed. Communications Comm., 316 U. S. 4, 86 L. Ed. 1229 51
Stoll v. Gottlieb, 305 U. S. 165, 83 L. Ed. 104 43
Sunflower Oil Company v. Wilson, 142 U. S. 313, 35 L. Ed. 1025 47
Thompson v. Texas Mexican R. R. Co., 328 U. S. 134, 90 L. Ed. 1132 42
Trans-Pacific Airlines v. Hawaiian Airlines, 174 F. 2d 63 48
Treinies v. Sunshine Mining Co., 308 U. S. 66, 84 L. Ed. 85 43
United States v. Interstate Commerce Comm., 337 U. S. 426, 93 L. Ed. 1451 ..... 38, 41
Vidal v. South American Securities Co., 276 Fed. 855 45
Williams v. Fanning, 332 U. S. 490, 92 L. Ed. 95 40
Wong Yang Sung v. McGrath, 339 U. S. 33, 94 L. Ed. 616 ..... 20, 49
Youngstown, etc. v. Sawyer, 96 L. Ed. (Adv. Ops. No. 16), p. 817 ..... 37, 40

STATUTES

Federal Home Loan Bank Act (47 Stats. 725) 8
Federal Home Loan Bank Administration Order No. 388 ..... 15, 55
Federal Home Loan Bank Administration Order No. 5082 11
Federal Home Loan Bank Administration Order No. 5083 11
Federal Home Loan Bank Administration Order No. 5084 11
Federal Home Loan Bank Administration Order No. 5254 ..... 13, 15
First War Powers Act (55 Stats. 838, Chap. 593, Public Law No. 354 ..... 8, 29
Home Owners' Loan Act of 1933 (48 Stats. 128) 8, 24, 49
Home Owners' Loan Act of 1933, Sec. 5(d) 49

PAGE

National Housing Act (48 Stats. 1246) 8
Public Law No. 404, Chap. 324 (79th Cong., 2d Sess.) 8
Reorganization Act of 1945 (59 Stats. 613, Chap. 580, Public Law No. 262) 8, 29, 30
United States Code, Title 5, Sec. 1009(d) 51
United States Code, Title 12, Sec. 1421 8
United States Code, Title 12, Sec. 1424 12
United States Code, Title 12, Sec. 1432 38
United States Code, Title 12, Sec. 1446 49
United States Code, Title 12, Sec. 1461 ..... 8, 24, 49
United States Code, Title 12, Sec. 1724 8
United States Code, Title 12, Sec. 1725(c)(4) 38
United States Code, Title 28, Sec. 118 5
United States Code, Title 28, Sec. 380(a) 3, 5
United States Code, Title 28, Sec. 1253 3
United States Code, Title 28, Sec. 1254 3
United States Code, Title 28, Sec. 1397 ..... 5, 8
United States Code, Title 28, Sec. 1655 5
United States Code, Title 28, Sec. 2361 ..... 5, 8
United States Code Annotated, Title 5, Secs. 1001-1011 8
United States Code Annotated, Title 28, Sec. 41(26) 5, 8
United States Code Annotated, Title 28, Sec. 1335 ..... 5, 8

IN THE

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No. .....

MALLONEE, BUCKLIN and FERGUS, Shareholders' Protective Committee, and LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioners,

vs.

FAHEY, AMMANN, as Conservator, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.,*

Respondents.

Shareholders' Protective Committee's and Long Beach Federal Savings and Loan Association's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Mallonee, Bucklin and Fergus, Shareholders' Protective Committee, and Long Beach Federal Savings and Loan Association, pray that writs of certiorari issue to review

the orders and judgments entered April 2, 1952 (rehearing petitions denied November 13, 1952), in Appeal No. 12511, and November 6th, 1952 (rehearing petitions denied December 17, 1952), in Appeal No. 12591, in the United States Court of Appeals for the Ninth Circuit, entitled:

APPEAL No. 12511:

FAHEY, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Appellants,

vs.

MALLONEE, *et al.*, Shareholders' Protective Committee of Long Beach Association, LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COMPANY, *et al.*,

Appellees.

APPEAL No. 12591:

FAHEY, *et al.*,

Appellants,

vs.

MALLONEE, *et al.*,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees.

and respectfully represent as follows:

Opinions Below.

The opinion in Appeal No. 12511 will be found in 196 F. 2d 336.

The preliminary injunction, with findings, made by the District Court, will be found in Volume XVIII, of printed record on Appeal No. 12511, pages 8187 to 8537, inclusive.

The opinion in Appeal No. 12591 has not yet been reported. It is filed herewith in slip opinion form.

For the convenience of the Supreme Court, petitioners have made their references to the pages of the Court of Appeals opinions by reference to slip opinions in both appeals, reprints of which are filed with these certiorari petitions.

Jurisdiction.

Jurisdiction of this United States Supreme Court is invoked:

(a) Under Title 28, United States Code, Section 1254, and

(b) Under Section 1253.

The original action was commenced by a complaint alleging, among other things, Acts of Congress unconstitutional. Upon the application for injunction, under the then Section 380(a) of Title 28, United States Code, as it existed in 1946 (now Title 28, U. S. C., Sec. 1253), a three-judge statutory court was convened.

By direct appeal in *Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030, and by original proceedings (writ of prohibition, etc.) in *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041 (1947), respondents attacked the jurisdiction of the District Court.

The United States Supreme Court decided part of the constitutional questions, denied the writ, and remanded the case to the District Court for further proceedings. Such proceedings were had and resulted in more than fifty final judgments.

Appeals were taken and dismissed from certain of these judgments. The balance became final judgments from lack of appeal.

In 1950, the Court of Appeals also denied respondents' applications for writs of prohibition, etc.

Yet in 1952, the Court of Appeals holds it was error for the District Court not to have dismissed the actions in 1946, holding the District Court was at all times wholly without jurisdiction of the subject matter.

This ruling is in direct conflict with the above United States Supreme Court decisions and mandates. Further, there is direct conflict between the two opinions of the Court of Appeals in these Appeals Nos. 12511 and 12591.

Jurisdiction of the District Court.

Jurisdiction was originally invoked in May and July, 1946, under:

(a) Old Title 28, United States Code, Section 380(a), and Section 118 (now Sec. 1655), by the Shareholders' Protective Committee, representatives of the class of 16,000 depositors, seeking preliminary and permanent injunctions based upon unconstitutional Acts of Congress;

(b) Old Title 28, U. S. C. A., Section 41(26) (now Secs. 1335, 1397 and 2361), through interpleader by deposit into the registry of the District Court of titles to, and payments upon, the homes for approximately 8,000 borrowers from the seized mutual savings association.

As a result of such interpleaders, over $14,000,000.00 in assets remain on deposit in the registry of the District Court.

Jurisdiction of the District Court over the titles to thousands of homes, real property situated within the District Court's territory, over $14,000,000.00 of notes, trust deeds, cash, government bonds, and other securities, physically on deposit in the registry with the Clerk of the District Court, and over real and personal property physically seized and retained by respondents, all within the territory of the District Court, are the main issues correctly decided by the District Court, and erroneously reversed by the Court of Appeals. Such erroneous reversal is in conflict with the prior decisions and mandates of this United States Supreme Court.

Questions Presented.

1. Court of Appeals Reverses Supreme Court:

Whether a mandate of the United States Supreme Court, directing further proceedings, and resulting in final judgments, can be reversed by Court of Appeals ordering dismissal of the action as beyond the jurisdiction of the District Court over the subject matter.

2. Enforceability of Government Insurance of Savings:

Whether insurance of savings deposits of Federal Savings and Loan Insurance Corporation can be enforced by United States Courts in the judicial district where the savings are deposited and insurance created by deposit of the savings in reliance upon Government insurance.

3. Accounting for Seized Savings:

Whether savings depositors can enforce a final judgment of the District Court, requiring accounting for their seized savings of approximately $26,000,000.00 in uncounted cash, government bonds, and negotiable securities, for which all receipts were refused at time of seizure.

4. Can Fraud Be Tried:

Whether fraudulent seizures by Government officials of solvent Federal Savings and Loan Associations and Federal Home Loan Banks can be tried by the United States Courts.

5. Refusal of Administrative Remedies:

Whether respondents can refuse a demanded administrative hearing, and thereafter obtain dismissal of court actions for "failure to exhaust administrative remedies."

6. Nullification of Government's Consent to Suit:

Whether a suit against "SUE OR BE SUED" Federal Savings and Loan Insurance Corporation and Federal Home Loan Banks is an unconsented suit against the United States, which must be dismissed without trial of fraudulent seizures.

7. Applicability of Administrative Procedure Act to Federal Home Loan Bank System:

Whether the Administrative Procedure Act applies to the Federal Home Loan Bank System, without express amendment of the Federal Home Loan Bank Act to that effect.

8. Existence of Federal Home Loan Banks:

Whether all Federal Home Loan Banks in the United States exist from day to day at the pleasure of respondents, Home Loan Bank Board.

9. Due Process:

Whether due process is denied by the Court of Appeals deciding without trial, liability for a denied debt of $7,000,000.00, yet holding the District Court without jurisdiction over the subject matter to try the disputed issues of fact.

10. Is Stock Ownership a Property Right:

Whether private ownership of corporate stock is a property right.

Statutes Involved.

(a) The Federal Home Loan Bank Act, 47 Stat. 725, 12 U. S. C., 1421, *et seq.*:

(b) The Federal Savings and Loan Association creative sections of the Home Owners' Loan Act of 1933, 48 Stat. 128, 12 U. S. C., 1461 *et seq.*;

(c) The Federal Savings and Loan Insurance Corporation creative sections of the National Housing Act, 48 Stat. 1246, 12 U. S. C., 1724 *et seq.*;

(d) The Administrative Procedure Act (U. S. C. A. Title 5, Secs. 1001 to 1011, incl., Public Law 404, 79th Congress, Chap. 324, Second Session), as applied to Federal Home Loan Banks and Federal Savings and Loan Associations' seizures, liquidations, mergers and conservatorships;

(e) The application of the interpleader statutes (old Title 28, U. S. C., Sec. 41(26), new Title 28, U. S. C., Secs. 1335, 1397, and 2361) to Federal Home Loan Banks, conservators appointed by Home Loan Bank Board and Federal Savings and Loan Insurance Corporation, as receiver, or otherwise;

(f) The First War Powers Act, 55 Stat. 838, Chapter 593, Public Law 354;

(g) The Reorganization Act of 1945, 59 Stat. 613, Chapter 580, Public Law 262.

Statement.

The litigation seeks recovery of, and accounting for, $70,000,000.00[1] of seized and confiscated savings deposits.

Accounting for $26,000,000.00 seized by respondents from petitioner Long Beach Federal Savings and Loan Association, is sought by its depositors' Protective Committee, on behalf of the 16,000 shareholders, whose savings were seized [R. 1-26, 8614-8743, Apl. 12511]. Recovery of, and accounting for, $46,000,000.00 is sought by stockholders suing for the class of all stockholders in the seized, liquidated and merged Federal Home Loan Bank of Los Angeles [R. 8614-8743, 9485-9494, Apl. 12511].

Both Banking institutions were summarily seized and confiscated by respondents without notice, hearing or trial[2] [R. 10, 13, 15-16, 304, 8229, 9107-9191, Apl. 12511].

The depositors and stockholders' complaints raised constitutional issues of denial of due process, unlawful searches and seizures, and other constitutional questions (332 U. S. at 247, 257, 91 L. Ed. at 2036, 2041) [Appeal

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[1]All figures are approximate.

[2]Hon. J. Alston Adams, member of respondent Home Loan Bank Board, testified under oath, referring to the seizures:

"Mr. Adams: . . . . the acts were arbitrary and capricious and vindictive, . . ."

Such testimony was given at Hearings Before a Special Subcommittee of the Committee on Expenditures in the Executive Departments, House of Representatives, Eighty-first Congress, Second Session, and Eighty-second Congress, First and Second Sessions, Investigation of the Home Loan Bank Board, at page 259 of the transcript of such hearings.

No. 12511, C. C. A. 9, Vol. I: R. 294-295, 330-331, 338, 349-350; Vol. II: R. 573-574, 583; Vol. VII: R. 3193-3194, 3207, 3251-3253, 3288, 3291, 3299, 3301-3303, 3308, 3320-3321; Vol. XX: R. 9470, 9476, 9484, 9491-9493].

In 1947, the United States Supreme Court in *Ex parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041, and *Fahey, et al. v. Mallonee, et al.,* 332 U. S. 245, 91 L. Ed. 2030, decided part only of the constitutional issues presented. The Supreme Court remanded to the District Court for further proceedings, including trial of:

> ". . . The plaintiffs' charges that ill will and malice actuated the supervising authorities . . ." (p. 257 of the U. S.).

On March 29, 1946, there existed at Los Angeles, California, the Federal Home Loan Bank of Los Angeles. The Bank had been founded in 1932 with an initial capital of $10,000,000.00 [R. 4559] and in fourteen years had grown to $46,000,000.00 [R. 3198]. It was completely solvent, prosperous and growing. Its surplus was approximately $1,900,000.00. It had never been accused of misconduct or wrongdoing of any nature. It had been examined by respondents just two weeks prior to its seizure. The examination report contained no criticism whatsoever, nor did it mention any matters requiring correction.

On the forenoon of March 29, 1946, without any prior notice, respondents entered the premises of the Los An-

geles Bank and seized possession of the Bank and all of its assets [R. 9107-9191]. As authority for such seizure, respondents produced certified copies of Federal Home Loan Bank Administration Orders Nos. 5082, 5083, and 5084. (See Appx. pp. 28 to 32.)

By the terms of these orders, the solvent, prosperous and growing Los Angeles Bank, was, without notice, hearing, trial, or accusation, liquidated, dissolved and merged, instantaneously and summarily, as of the moment of the service of the seizure orders. Its $46,000,000.00 in assets were thereby immediately transferred to the $9,-000,000.00 Portland Bank (one of respondents), whose President was then present and received possession of the seized $46,000,000.00 [R. 8225].

Respondent San Francisco Bank is the creature of these seizures. Its existence, if any, arose from the "merger" of the Los Angeles Bank into the Portland Bank.

The seizure orders had been typed, respondents' official seal affixed (but not signed), in Washington, D. C., and transported to Los Angeles, California, 3,000 miles distant, and there kept secret for several days until the simultaneous moment of issuance in Washington, D. C., and enforcement in Los Angeles, California [R. 9139-9140, Apl. 12511].

Respondents testified before Congressional Investigating Committees that secrecy was essential to prevent the Los Angeles Bank resisting the seizure in the Courts [R. 9140, Apl. 12511; see also pp. 53, 77-80, of testimony

before Special Committee to Investigate Executive Agencies, House of Representatives, Seventy-ninth Congress, Second Session, H. Res. 88]. However, the President of the Portland Bank received sufficient notice to be on hand in Los Angeles (900 miles distant) at the hour of seizure to receive the confiscated $46,000,000.00.

Federal Home Loan Bank stockholders are the savings associations entrusted with the deposits of hundreds of thousands of savers and homeowners within the Federal Home Loan Bank District (12 U. S. C. 1424).

Among the stockholders of the seized and confiscated Los Angeles Bank was petitioner Long Beach Federal Savings and Loan Association, which owned Los Angeles Bank stock of a par value of $340,000.00, and an actual value of approximately $400,000.00 [R. 3248].

The Los Angeles Bank held for safekeeping (and for no other purpose) $8,300,000.00 of United States Government Bonds, owned by, and the property of, petitioner Federal Savings Association [R. 8402]. Said Association was not then in debt to said Los Angeles Bank, any of respondents, or any Government agency, in any amount whatsoever.

The President of petitioner was one of the directors of the Los Angeles Bank. He spearheaded the fight for the return of the seized Los Angeles Bank [R. 4566].

A Committee of the stockholders of the seized Los Angeles Bank was formed. It sought a Congressional Investigation of the confiscation and seizure, retained counsel, and commenced preparation of legal proceedings to recover the $46,000,000.00 of seized Los Angeles Bank assets [R. 4566].

Federal Savings Association Seizure.

Petitioner Federal Savings Association had been founded in 1934 with an initial capital of $7,500.00. In twelve years it had grown to have $26,000,000.00 in assets, and a surplus, reserves, and undivided profits, of approximately $1,300,000.00. It had 16,000 depositors and approximately 8,000 borrowers [R. 3195]. In the last month before its seizure, it had grown approximately $500,000.00 in new deposits [R. 3218].

On May 20, 1946, just fifty-five days after the seizure, confiscation and destruction of Los Angeles Bank, petitioner Federal Savings Association was similarly, without notice, hearing, or trial, seized, and its confiscation attempted.

Respondents' seizing agents who had confiscated the Los Angeles Bank, presented a plain, uncertified, unsigned, typed copy of Order No. 5254 (see Appx. p. 32), purporting to appoint respondent Ammann as conservator for the Federal Savings Association [R. 8229].

Petitioner's officers at first refused to surrender the $26,000,000.00 in uncounted cash, bonds, and negotiable securities, whereupon respondent Ammann signed his own name, certifying to the order appointing himself as conservator for the seized Savings Association.

Petitioner demanded receipts or acknowledgments for the $26,000,000.00 in uncounted cash, government bonds, and negotiable securities thus seized. Receipts were summarily refused and were never given [R. 208, 8279].

This seizure order likewise was kept secret by respondents until enforced by confiscation of petitioner Federal Savings Association's assets, premises and business.

$10,000,000.00 Run.

Respondents, upon obtaining possession, stated their intention to destroy the Association [R. 116, 118, 211, 9169, Apl. 12511], and immediately mailed to all the 16,000 depositors, a statement fraudulently charging "mismanagement" and "unsafe operation" of the seized Federal Savings Association [R. 3108, Apl. 12511. See also pp. 369-371 of testimony before Special Subcommittee of the Committee on Expenditures in the Executive Departments, House of Representatives, Eighty-first Congress, Second Session, Investigation of the Home Loan Bank Board]. Newspaper front-page publicity followed, and a multi-million dollar run of withdrawals ensued. The run, at the rate of $1,000,000.00 to $2,000,000.00 a day, aggregated $10,000,000.00, nearly one-half of all savings deposits at the time of the seizure [R. 8249, Apl. 12511]. (See Plates Nos. 1 and 2 for pictures of run, and Plate No. 3 for chart showing loss of savings deposits under conservator.)

The run stopped only when the Shareholders' Protective Committee filed this action in the United States District Court to recover the seized Federal Savings Association [R. 2355-2357, Apl. 12511].

Homeowners' Titles Clouded.

At the time of the first seizures, respondents' actions, in seizing, transferring and commingling the seized assets, hopelessly tangled and clouded the titles to the homes of the 8,000 borrowers from the Savings Association [R. 8409-8411, 2393, 2519, 2561, 3136; Apl. 12511] (see Appx. pp. 41 to 47; see also p. 369 of 196 F. 2d Op. in Appeal No. 12511).

In September, 1946, a special Three-Judge Court at Los Angeles, without trial, declared one of the seizures

unconstitutional, and ordered return of the seized savings (*Mallonee, et al. v. Fahey, et al.*, 68 Fed. Supp. 418).

In 1947, the United States Supreme Court, on appeal by the seizing respondents, reversed and held trial of the facts was necessary. Thereafter, the President "reorganized" the respondent Government Agency from a one-man Commissioner to a three man Board (196 F. 2d 336, at p. 340, Op. of C. C. A.-9 in Appeal No. 12511).

The Commissioner who had ordered the seizures, "left office." The new Board members rescinded the original seizure order for the Long Beach Savings Association, confessed judgment, and ordered respondents to account with the District Court for the seized savings of the depositors.[8]

The Association's officers and directors posted in the United States Court a $1,000,000.00 Fidelity Bond, and invited anyone claiming against any of them to levy against the Bond. The Bond [R. 3553-3556a, 8318, 10333-10334, Apl. 12511], has been in force for five years without a single claim against it.

The new Board also promised immediate restoration of the seized Los Angeles Bank.

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[8]In 1948, by Order No. 388 [R. 8231-8233, 8310-8327, 3404-3405, 3409-3420, Apl. 12511] (see also Appx. p. 34). Respondent Board rescinded Order No. 5254 (Appx. p. 32) (by which petitioner Federal Savings Association was seized), removed respondent Ammann as conservator, required the removed conservator to account with the District Court for the $26,000,000.00 of savings seized from the 16,000 depositors. By its terms, said Order No. 388 required that a certified copy thereof be filed with the District Court in both the Los Angeles Bank action and the seized Federal Savings Association action. Such was a general appearance by respondents and cured any questions of indispensable parties, absent defendants, or similar matters. The District Court so found [R. 8301-8302, 3404-3405].

Threatened Second Seizure of Savings Association.

Twenty months had passed. Respondents' promise to restore the Los Angeles Bank was unfulfilled. The District Court made its order requiring respondents and the other parties to report to the Court on the progress of the settlement [R. 7193-7196, Apl. 12511].

At the Court hearing concerning such report, respondents announced to the Court they had instituted proceedings, BEFORE THEMSELVES, for a second seizure of Federal Savings Association, by appointment of their *alter-ego,* respondent Federal Savings and Loan Insurance Corporation, as receiver of the Federal Savings Association [R. 10793-10796, 8242-8247, 8286, Apl. 12511]. Appointment of such receiver is only for the purpose of liquidation. [See p. 169 of testimony before Special Committee to Investigate Executive Agencies, House of Representatives, Seventy-ninth Congress, Second Session, H. Res. 88.]

Thereby, respondents would obtain control of the litigation against themselves, and be enabled to escape all liability for accounting for the seized assets, uncounted cash, and negotiable securities amounting to $26,000,000.00 [R. 8268-8269, Apl. 12511].

The seized assets are mutually owned by, and the property of, the 16,000 depositors who are suing to enforce against respondent Federal Savings and Loan Insurance Corporation, insurance of their over $22,000,000.00 of savings deposits, and to compel accounting for their seized savings [R. 6639-6717, Apl. 12511].

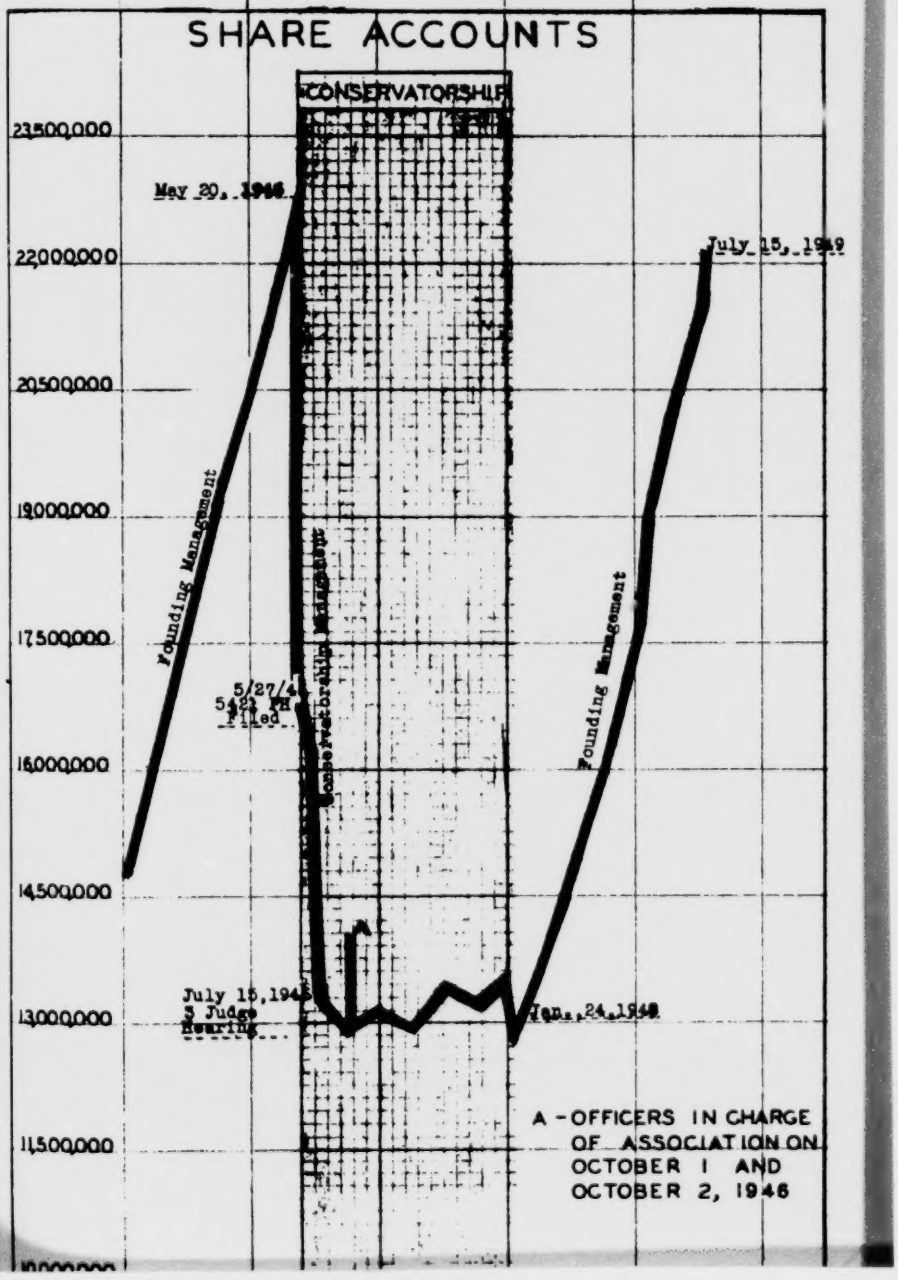
Thereafter, on motion of petitioners, the District Court enjoined the second seizure of Federal Savings Association, pending trial of the removed conservator's account-

PLATE 1

PLATE 2

PLATE 3

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION
JANUARY 1, 1945 TO JULY 15, 1949



ing and the disputed issues of the first seizures [Vol. XVIII, R. 8187-8537, Apl. 12511].

Seized Los Angeles Bank stockholders, suing as a class for the return of the $46,000,000.00 in assets of their confiscated Bank, applied to the District Court for an allowance on account of attorneys' fees to prosecute their action for the recovery of their seized Bank and its assets [R. 5698-5754, 8909, 9022, Apl. 12511].

The United States Supreme Court in *Ex parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041 (1947), had refused to prohibit similar allowance of attorneys' fees to the Shareholders' Protective Committee of the seized Federal Savings Association.

As a result of receiving the fees thus allowed, petitioners had recovered their seized Federal Savings Association from respondents, and had obtained a judgment requiring an accounting [R. 8310-8328, Apl. 12511].

The District Court, following the United States Supreme Court mandate in *Ex parte Fahey, supra,* and in *Fahey, et al. v. Mallonee, et al., supra,* made allowances to the counsel for the seized Los Angeles Bank stockholders [R. 288-312, Apl. 12591]. Respondents appealed both the injunction against second seizure of petitioner (Appeal No. 12511), and the allowance of attorneys' fees to the stockholders of the seized Los Angeles Bank (Appeal No. 12591) [R. 8557, 8559, Apl. 12511; and R. 322-323, Apl. 12591].

Such appeals resulted in opinions by the Court of Appeals in 1952, that the District Court has at all times been without jurisdiction of the subject matter of the actions, and ordering dismissal (196 F. 2d 336, at 379, Op. in Appeal No. 12511). There are six other appeals yet

pending undecided before the same Court of Appeals. (See Appx. pp. 49 to 51 for a complete list of litigation.)

Such ruling is in direct conflict with the mandate [R. 2302-2304, Apl. 12511], of the United States Supreme Court in 1947, and the decisions in *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041, and in *Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030, and with previous mandates [R. 3550-3552, 3976-3978, Apl. 12511], of the same Court of Appeals in 1948, on previous appeals then taken by respondents and dismissed. It is also contrary to denial of writs of prohibition, mandamus, etc., by the same Court of Appeals in 1950 (see Appx. p. 47).

The rulings are also contrary to many final judgments of the District Court made in reliance upon the previous mandates [R. 2302-2304, Apl. 12511], of the United States Supreme Court, and the Court of Appeals [R. 3550-3552, 3976-3978, Apl. 12511]. Such final judgments include the finding that respondents:

> ". . . intended to merge or consolidate the Long Beach Federal Savings and Loan Association with other financial institutions and did intend thereby to destroy its identity . . . and thus render moot the questions presented in this litigation, . . ." [R. 2355-2358, Apl. 12511.]

The District Court also found:

> "That the court has jurisdiction of the persons and subject matter involved." [R. 2354, Apl. 12511.]

Respondents took appeals from these findings. In 1948 the appeals were dismissed [R. 3550-3552, 3976-3978, Apl. 12511].

More than fifty final judgments [R. 8288-8293, Apl. 12511], in the District Court, entered in reliance upon the

Supreme Court's mandate for further proceedings, are swept aside by the Court of Appeals' opinions.

As a result of such final judgments:

(a) More than $14,000,000.00 in cash, United States Government Bonds, notes, and deeds of trust, are on deposit in interpleader in the registry of the District Court [R. 8268-8269, Apl. 12511];

(b) The seizing conservator was removed, and ordered to account [R. 8310-8328, 8987-8996, Apl. 12511]; and

(c) Titles to the homes of approximately 8,000 borrowers (tangled and rendered unmarketable by the seizures, assignments, and commingling by respondents of the seized assets), were cleared and quieted [R. 8287-8293, 8534, 8399-8525, 2393, 2519, 2561, 3136, Apl. 12511].

All these judgments are four years or more final, by failure to appeal therefrom, or by appeals previously taken and dismissed.

Express stipulations [R. 6562-6564, Apl. 12511], of the Attorney General, filed with the District Court, agreeing that the Court should decide various of the issues, and relied upon [R. 6527-6550, Apl. 12511], by the District Court and parties, are held to be void and ineffective.[4]

The Administrative Procedure Act is held inapplicable to the Federal Home Loan Bank System. It is held Congress must expressly amend the Federal Home Loan Bank Act subsequent to passing of the Administrative

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[4]Page 67 of C. C. A.-9 Opinion in Appeal No. 12591.

Procedure Act, in order for its "procedural reforms" to apply.[5]

Successive deposits in the registry of the District Court in interpleader, of disputed insurance premiums as payment for insurance of $22,000,000.00 of savings deposits by respondents Federal Savings and Loan Insurance Corporation, are held ineffective, as beyond the jurisdiction of the Court, notwithstanding no appeal was taken from any of the eight successive deposits, resulting in over $120,000.00 of insurance premiums so deposited in Court (196 F. 2d 336, at 337-399).

A denied debt of $7,000,000.00, created by one respondent in favor of another respondent in violation of a restraining order of the District Court [R. 33-34, 8614-8742, Apl. 12511], is held a binding obligation against the savings deposits of 16,000 depositors, without evidence or trial of the issues of their denial of liability [R. 4178, 8614-8742, Apl. 12511]. While wholly denying the District Court all jurisdiction of the subject matter, and ordering the action dismissed, the Court of Appeals, at the same time, decides without trial, the disputed issues of liability for the $7,000,000.00 debt (pp. 19 and 99 of the Op. in Appeal No. 12591).

Administrative Remedies.

There were no administrative remedies available in the Los Angeles Bank seizure. Non-existent administrative remedies could not bar immediate court relief on this confiscation. Petitioner Federal Savings Association raised the issues of this confiscation which included its

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[5]Pages 96-98, Opinion of C. C. A.-9 in Appeal No. 12591. But see *Wong Yang Sung v. McGrath*, 339 U. S. 33, 94 L. Ed. 616 (1950), to the contrary.

$8,300,000.00 in bonds, and $400,000.00 in Federal Home Loan Bank stock, seized in the Los Angeles Bank confiscation [R. 286-302, 4161-4332, Apl. 12511].

The administrative remedies in the Long Beach Federal Savings Association seizure were demanded in 1946.

The depositors' Protective Committee, upon the grounds the statute was unconstitutional, enjoined this hearing, which, if held during the $10,000,000.00 run, would have destroyed their savings association.

The United States Supreme Court, in 1947, reversed such injunction.

In 1948, the new three-man Board rescinded the first seizure order, removed the seizing conservator, required him to account with the District Court, and restored the remnants of the seized Association to its founding management [R. 8231-8233, 8310-8327, 3404-3405, 3409-3420, Apl. 12511].

Other depositors demanded that administrative hearings then be held. Their demands were refused by respondents on the ground that all issues were before the District Court for decision. (See Appx. pp. 19 to 21.) The administrative process was thus completely exhausted in 1948.

Respondents, who refused and denied administrative hearing, now plead "failure to exhaust administrative remedies," as a bar to the very relief they themselves ordered granted by the District Court, including an accounting for the $26,000,000.00 of depositors' seized savings.

These same respondents are also pleading the statute of limitations as their defense against actions brought by

the depositors' Protective Committee for declaratory relief, and to enforce liability of the Federal Savings and Loan Insurance Corporation for its insurance of the $22,000,000.00 of savings deposits in their mutual Federal Savings and Loan Association. (See Appx. pp. 24 to 25.)

To deny court relief at this stage, is to close forever the doors of all reviewing courts. By restoring a portion of the depositors' seized savings, respondents hope to escape accounting for what they seized and failed to return, thus the depositors would be forever denied their day in court to recover their seized savings.

Specifications of Error.

The Court of Appeals erred in Appeal No. 12511, when it held:

1. That none of the complaints, cross-claims, or other pleadings, stated a claim upon which relief could be granted or could be amended to state such a claim.

2. That the District Court was without power to preserve the *status quo* pending review of prior final administrative orders.

3. That proceedings ordered tried by the United States Supreme Court in 1947 must be dismissed by the District Court in 195? after final judgments made in reliance on the Supreme Court mandate.

4. That final judgments[6] for accounting for $26,000,000.00 of seized uncounted cash and valuables could not be enforced against seizing respondents.

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[6]The judgments were final for four years from failure to appeal therefrom.

5. That insured savings depositors could not enforce their government insurance in the United States Courts within whose district the savings were deposited in reliance upon the public offer of insurance.

The Court of Appeals erred in Appeal No. 12591, when it held:

6. That a Federal Savings Association cannot sue a Federal Home Loan Bank for the recovery of $8,300,000.00, seized United States Government bonds deposited with the Bank for safekeeping only.

7. That suits against Government officials for unconstitutional seizures, denying due process, are unconsented suits against the United States, and must be dismissed without trial.

8. That a denied debt for $7,000,000.00 can be foreclosed without trial, upon a decision by the Court of Appeals, at the same time holding the District Court is without jurisdiction to decide the untried issues.

9. That stockholders and members in the Federal Home Loan Bank System can have no justiciable right to recover their seized and confiscated savings deposits.

10. That respondent Bank Board, an executive agency, reorganized as such by two Presidents and Congress, is nevertheless "an arm of Congress," exempt from the Constitution, immune from all court process, whose *ex parte* orders are final and conclusive as Supreme Law of the United States.

11. That the private ownership of corporate stock is not a property right.[7]

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[7]The Court of Appeals so holds in the opinion in Appeal No. 12591, at page 75.

REASONS FOR GRANTING THE WRIT.

A. Public Interest.

The decisions of the Court of Appeals decide, in conflict with prior decisions of the Supreme Court in *this same* litigation[8] and in other cases, constitutional questions affecting the safety and protection of savings deposits of over $10,000,000,000.00[9]

Congress created the Federal Savings and Loan Insurance Corporation, the Federal Savings Associations, and Federal Home Loan Banks, as a unified system, to insure and guarantee the safety of the deposits of savings and of the homes of millions of our citizens. The Federal Savings System was created:

> ". . . to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes . . ."[10]

In reliance upon Government insurance of their savings deposits and the unified Federal plan of Federal Savings and Loan Associations, backed by Federal Home Loan Banks, with savings deposits guaranteed and insured by the Federal Savings and Loan Insurance Corporation, the System grew until there are:

(a) 12,000,000 depositors and borrower members of more than 1,500 Federal Savings and Loan Associations,

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[8]*Fahey, et al. v. Mallonee, et al.,* 332 U. S. 245, 91 L. Ed. 2030; *Ex parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041.

[9]All figures are approximate. Figures are from reports to Congress of Home Loan Bank Board, General Accounting Office, Federal Savings and Loan Insurance Corporation, and similar sources.

[10]*Home Owners' Loan Act of 1933,* 48 Stat. 128, 12 U. S. C. 1461 *et seq.*

whose savings deposits, and loans upon homes, aggregate $10,000,000,000.00.*

(b) The Federal Home Loan Bank System has 4,000* savings deposit Associations, both state and federal, whose savings deposits and home loans, approximate $18,000,000,000.00. All are completely dependent upon the Federal Home Loan Banks for rediscount of their home loans to realize cash for emergencies.

(c) The Federal Home Loan Banks alone have assets of almost $1,100,000,000.00, all representing savings deposits and loans on homes.

(d) Respondents Federal Savings and Loan Insurance Corporation has insured and guaranteed the safety of the deposited savings of almost 6,000,000 depositors. The savings deposits thus insured approximate $10,000,000,000.00.

The Savings and Loan System, with its rediscount Federal Home Loan Banks, and its Government insurance of savings deposits through respondent Federal Savings and Loan Insurance Corporation, is a vital, and major, segment of the entire Banking structure of the Nation.

Panic or uneasiness, endanger this system and spread instantly to all Banks and Savings Associations; particularly in communities where Federal Savings Associations or Federal Home Loan Bank seizures have occurred.

The Court of Appeals' opinions destroy and shake public confidence in the whole Federal Savings System by holding:

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*All figures are approximate.

(a) That depositors whose savings are insured by the Government, through the respondent Federal Savings and Loan Insurance Corporation, cannot enforce that insurance through the local United States Courts. (196 F. 2d 336, at 370, 379-382, Op. in Appeal No. 12511.)

(b) That fraudulent seizures of insured savings institutions, or of Federal Home Loan Banks, cannot be tried by the United States or any Courts. (196 F. 2d 336, at 380, Op. in Appeal No. 12511, and pp. 55, 94 of Op. in Appeal No. 12591.)

(c) That all Federal Home Loan Banks exist from hour to hour at the pleasure of respondent Board, and can be instantaneously abolished, merged, or liquidated, without notice or hearing. (Pp. 35-37, 93 of Op. in Appeal No. 12591.)

(d) That neither the constitutional guarantees of due process (Op. in Appeal No. 12591, pp. 27 *et seq.*, 35, 38), nor the Administrative Procedure Act (Op. in Appeal No. 12591, pp. 93, 95), has any application to the Federal Home Loan Bank System.

By such holding, more than 16,000 depositors, whose savings were summarily seized without notice or hearing, and approximately 8,000 borrowers, whose titles to their homes were hopelessly tangled and clouded by the seizures and transfers of the seized assets, are denied all access to the United States Courts for any relief.

Also, all of the 12,000,000 of such depositors and homeowners throughout the Nation are thereby denied the protection of:

1. The United States Constitution,

2. The express enactments of Congress in creating the Federal Savings System, and

3. The remedial provisions of the Administrative Procedure Act, enacted to curb just such administrative abuses and excesses, and referred to in the first United States Supreme Court decisions in this litigation.[11]

B. Court of Appeals Confuses Executive With Congressional Agencies.

The Court of Appeals' opinions demonstrate complete confusion as to the status of respondents (Fahey, as Federal Home Loan Bank Commissioner, and Home Loan Bank Board, as his successors).

In the Opinion on Appeal No. 12591, on page 18, the Court says:

> ". . . Congress saw fit to create its own administrative arm or agency (the Home Loan Bank Board) . . ."

On page 39:

> ". . . Congress . . . intended to, and did, create a Federal agency and instrumentality of the LEGISLATIVE branch . . ." (Emphasis added.)

On page 88, the purpose of Congress was:

> ". . . to exercise this control through its own administrative agency . . ."

Based on these rulings, the Court of Appeals, in Appeal No. 12591, holds that Congress, through *its* agency, is beyond the Constitution and all guarantees of due process, is immune from all courts, and that arbitrary, capricious, and fraudulent actions by such agency of Congress, are

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[11] *Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245 (at p. 256), 91 L. Ed. 2030; *Ex parte Fahey*, 332 U. S. 248, 91 L. Ed. 2041.

conclusive and unreviewable, but on page 27, of the same opinion, the Court says:

> ". . . The Federal Home Loan Bank Board is clearly an agency of the United States and a branch of the EXECUTIVE Department of the Government, and we so hold." (Emphasis added.)

In the opinion in Appeal No. 12511, this same hydra-headed "arm of Congress" and "Branch of the Executive Department," is held subject to the provisions of the Administrative Procedure Act,[12] and its seizure orders subject to judicial review.[13] But the action seeking such review is held not to state a cause of action!

The records of the Congressional Investigations disclose that respondent Fahey, the "arm of Congress," dared not seize and liquidate the Los Angeles Bank until he had sought (and claims to have obtained) Presidential approval. Approval obtained by reading to Presidential Assistant Snyder at the White House, on the telephone, an anonymous letter received by Fahey. (See Appx. p. 22; pp. 1807-1808 of Hearings Before a Special Subcommittee of the Committee on Expenditures in the Executive Departments, House of Representatives, Eighty-first Congress, Second Session, Investigation of the Home Loan Bank Board.)

The "arm of Congress" was created as a five-man Board in 1932 by Act of Congress, but in 1942, under

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[12]Pages 381-383 of opinion in Appeal No. 12511, 196 F. 2d.

[13]Pages 375-390 of opinion in Appeal No. 12511, 196 F. 2d.

the Reorganization of Executive Departments, under the First War Powers Act,[14] the PRESIDENT reorganized the "arm of Congress" into the one-man Federal Home Loan Bank Commissioner, respondent Fahey.

Under the authority of the First War Powers Act, the President could reorganize only EXECUTIVE DEPARTMENTS.[15] Five years later, in 1947, under the Reorganization Act of 1945, which also authorized reorganization only of Executive Departments,[16] the President again reorganized the "arm of Congress" into respondent three-man Home Loan Bank Board.[17]

That President Roosevelt in 1942, and President Truman in 1947, should both reorganize an "arm of Congress" as an EXECUTIVE branch is unbelievable. That the

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[14]The First War Powers Act, 55 Stat. 838, Chapter 593, Public Law 354.

[15]The First War Powers Act, 55 Stat. 838, Chap. 593, Public Law 354, Sec. 1. ". . . the President is hereby authorized to make such redistribution of functions among EXECUTIVE AGENCIES as he may deem necessary, . . ." (Emphasis added.)

[16]The Reorganization Act of 1945, 59 Stat. 613, Chap. 580, Public Law 262. "Sec. 7. When used in this Act, the term 'agency' means any executive department . . . board . . . officer . . . administration or other establishment in the executive branch of the Government . . ."

[17]On page 342 of the opinion in Appeal No. 12511, 196 F. 2d, footnote No. 3, the Court of Appeals summarizes the history of respondents Home Loan Bank Board and their predecessors Fahey, Federal Home Loan Bank Administration, and describes in detail the various Presidential reorganizations of the Executive Agencies, later referred to in the opinion in Appeal No. 12591, as the "arm of Congress."

80th Congress which, under Reorganization Act of 1945, possessed the power to disapprove such reorganizations,[18] should acquiesce in, and ratify, such a grave error is impossible.

If the Court of Appeals is correct and President Roosevelt, President Truman, and the 80th Congress, were all wrong, then the original five-man Federal Home Loan Bank Board, created by Congress, has never been validly reorganized, and the Federal Home Loan Bank System has been, since 1942, and is yet, without a valid Board.

Such error on the part of the Court of Appeals permeates the 200 pages of opinions in both cases.

By misconceiving an Executive Branch to be Legislative, the Court holds it immune to suit, beyond the Constitution, and precludes any citizen being able to ever state a cause of action against respondent under any circumstances.

Of course, Congress has no more authority than has the President to violate the Constitution, nor to exempt agencies from the Constitutional requirements of due process.

No Government official, whether agency of Congress or of the President, can violate the Constitution or exceed his statutory authority and prevent the courts declaring his void action illegal.

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[18]The Reorganization Act of 1945, 59 Stat. 613, Chap. 580, Public Law 262, Sec. 6.

C. Conflicts Between United States Courts.

I. DIRECT CONFLICT BETWEEN COURT OF APPEALS AND 1947 UNITED STATES SUPREME COURT DECISIONS IN THIS CASE.

(a) Can Fraud Be Tried?

In *Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030, at page 257 of the U. S., Supreme Court said:

> "Nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies."

The Court of Appeals in its two opinions,[19] has reversed this holding of the Supreme Court. It orders dismissed, as beyond the power of any court to decide, actions to test the instantaneous seizures, liquidation, merger, and dissolution, of the solvent, prosperous and growing $46,000,000.00 Federal Home Loan Bank of Los Angeles, and exposes to a similar instantaneous seizure, the Long Beach Savings Association, restored to its original management by a final judgment of the District Court in 1948.

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[19]In 200 printed pages of opinions and footnotes, the Court of Appeals makes more than 65 references to ONE of the TWO companion cases before the Supreme Court in 1947, *Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030, but nowhere does the Court of Appeals refer to the other, *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041, in which a writ of prohibition, etc., was denied by the Supreme Court. The Court of Appeals reversed the District Court allowance of attorneys' fees, and held the District Court was without jurisdiction of the subject matter, a contention made to the Supreme Court in 1947 on the writ proceedings. The Supreme Court denied the writ.

The holdings of the Court of Appeals' opinions are aptly summarized by Justice Douglas in his opinion of November 20, 1952, *re* stay pending certiorari, 97 L. Ed. Adv. No. 2, page 117, wherein he said:

> ". . . The Court of Appeals for the Ninth Circuit reversed on the grounds that the District Court lacked jurisdiction of the subject matter. Home Loan Bank Board v. Mallonee, *et al.*, 196 F. 2d 336; Fahey v. O'Melveny & Myers, *et al.*, ... F. 2d ..... (decided November 6, 1952)."

Thereby, the Court of Appeals' opinions are in direct conflict with the prior (1947) decisions of the United States Supreme Court in this same litigation.

In 1947, the United States Supreme Court issued to the District Judge, Honorable Peirson M. Hall, its "Rule to Show Cause" why the Supreme Court should not issue its writ of prohibition against the District Court for lack of jurisdiction.

The District Court filed its printed return to the rule to show cause. On page 18 of the Appendix thereto, the District Court stated to the United States Supreme Court that it intended to, and would, make the finding:

> ". . . (2) That the Court has jurisdiction of the persons and subject matter involved, . . ."

In *Ex parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041, the Supreme Court denied the writ of prohibition.

Upon the remand, the District Court embodied that finding into its final judgment [R. 1448, Apl. 12511].

Respondents appealed the judgment, including that finding, to the Court of Appeals in 1947. The appeal was dismissed in 1948.

In 1952, the Court of Appeals holds the District Court without jurisdiction of the subject matter of the very issues the Supreme Court remanded to the District Court for trial.

The Supreme Court said at page 257 of the U. S.:

> ". . . The plaintiffs' charges that ill will and malice actuated the supervising authorities, . . . are alike undetermined by the courts below, . . ."

If the Court of Appeals' opinions stand, such charges will never be determined as to the seized, merged, and liquidated, Federal Home Loan Bank of Los Angeles, either by the courts below or by any court ever. (See pp. 36-37, 88 of Op. on Appeal No. 12591.)

The law established in 1947 by the United States Supreme Court, and reversed in 1952 by the Court of Appeals, is of nationwide importance.[20]

On page 355 of the No. 12511 Appeal, 196 F. 2d, the Court of Appeals says:

> ". . . And the charge of fraud or a fraudulent conspiracy of Administration officials was not before the Supreme Court in the then pleadings of Mallonee."[21]

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[20]The previous Supreme Court decisions of this same litigation, *Ex parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041, and *Fahey, et al. v. Mallonee, et al.,* 332 U. S. 245, 91 L. Ed. 2030, in only five years have been the subject of 32 citations in Shepard Citator of United States Supreme Court decisions.

[21]Also on page 336 of 196 F. 2d the Court of Appeals repeats this in different language.

The Supreme Court interpreted these same pleadings on page 247 (of 332 U. S.):

> ". . . The complaint alleged that the Conservator and the Chairman had seized the property without due process of law, motivated by malice and ill will . . ."

And again on page 257, the Supreme Court invited amendment when it said:

> "It is obvious that there is more to this litigation than meets the eye on the pleadings . . ."

(b) Right to Amend Denied.

On pages 370 to 374, inclusive, 196 F. 2d, the Court of Appeals' opinion No. 12511, denies the right to a District Court to permit amendment, and holds (at p. 372) that in permitting amendment, the District Court:

> ". . . runs counter to the holding in Fahey v. Mallonee, *supra,* and was without support in the law as pronounced by the Supreme Court. . . ."

The Court of Appeals further says on page 370:

> ". . . the lower court . . . erred when it *then* failed to promptly dismiss these actions. . . ." (See also p. 355.)

The Supreme Court said in *Fahey, et al. v. Mallonee, et al.* (p. 257 of the U. S.):

> "Nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies. . . .
>
> ". . . . . .
>
> "It is obvious that there is more to this litigation than meets the eye on the pleadings. The plaintiffs'

> charges that ill will and malice actuated the supervising authorities, . . . are alike undetermined by the courts below, . . ."

The District Court construed this as meaning that a trial on the merits should be had and amendments of the pleadings permitted if necessary.

The Court of Appeals interprets this same language as requiring an immediate dismissal without trial, of all cases then pending in the District Court.

(c) Dismissal Erroneously Ordered.

In *Fahey, et al. v. Mallonee, et al.*, 332 U. S. at page 258, the Supreme Court said:

> ". . . any other administrative or judicial proceedings which may be warranted by law . . ."

But the Court of Appeals in 1952, at page 355 of 196 F. 2d in Appeal No. 12511, said:

> ". . . We find it impossible to reconcile . . . that the Supreme Court approved *both* the administrative hearings and the lower court proceedings . . ."

Upon this basis the Court of Appeals, on page 379, says:

> ". . . we now hold that the court should have dismissed all of these original (five) actions for the reason that they failed to state a claim upon which relief could be granted . . ."

This direct conflict in interpretation of language and mandate of the Supreme Court in the 1947 appeals and writs IN THIS SAME CASE, requires Supreme Court review to preserve the integrity of its former opinions and mandate.

II. DIRECT CONFLICTS BETWEEN COURT OF APPEALS' OPINIONS AND OTHER UNITED STATES SUPREME COURT DECISIONS.

In holding that fraudulent, unconstitutional unauthorized and malicious administrative seizures and confiscations are beyond the power of all courts to review or correct, the Court of Appeals' opinions are in direct conflict with the following recent United States Supreme Court decisions:

(a) On Immunity to Suit.[22]

(1) *Land v. Dollar,* 330 U. S. 731, 91 L. Ed. 1209—(1947),

the United States Supreme Court said at page 735 of the U. S.:

> ". . . THIS IS THE TYPE OF CASE WHERE THE QUESTION OF JURISDICTION IS DEPENDENT ON DECISION OF THE MERITS.
>
> "The allegations of the complaint, if proved, would establish that petitioners are unlawfully withholding respondents' property under the claim that it belongs to the United States . . .
>
> ". . . . . .
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> ". . . But public officials may become tortfeasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, . . . The dominant interest

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[22]The Court of Appeals' Opinion in No. 12591, at page 94 of Slip Opinion, expressly refuses to recognize or apply *Land v. Dollar* or *United States v. Lee,* 106 U. S. 196.

of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld." (Emphasis added.)

(2) *Youngstown, Etc. v. Sawyer,* 96 L. Ed. Adv. No. 16, page 817—(June 1952).

An injunction against unauthorized seizures by a cabinet officer was affirmed, notwithstanding the order for seizure was signed by the President himself. Among the opinions of the Justices, is the following at page 829:

". . . To deny inquiry into the President's power in a case like this, because of the damage to the public interest to be feared . . . would in effect always preclude inquiry into challenged power, . . ."

Further at page 866:

". . . The executive action we have here originates in the individual will of the President and represents an exercise of authority without law . . ."[23]

(b) On No Justiciable Issue.

In holding that no justiciable issue is presented by allegations of arbitrary, malicious and unauthorized administrative action, the Court of Appeals' Opinion [24] are in direct conflict with:

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[23]On pages 52 and 55, and 95 of the Court of Appeals' opinion in No. 12591, it holds that actions to confine respondents within statutory and constitutional bounds, are unconsented suits against the United States, which is also held to be an indispensable party.

[24]The Court of Appeals in No. 12591, at pages 55, 73, and 95 so holds. On page 37 of Appeal No. 12591, the Court of Appeals cites as authority, and quotes from, *Joint Anti-Fascist v. McGrath,* 341 U. S. 123, 95 L. Ed. 817 (1951), as supporting its said holding.

(3) *United States v. I. C. C.,* 337 U. S. 426, 93 L. Ed. 1451,—(1949),

wherein the Court said at page 431 of the U. S.:

". . . But the Government charged that the order was issued arbitrarily and without substantial evidence. This charge alone would be enough to present a justiciable controversy . . ."

and with:

(4) *Joint Anti-Fascist v. McGrath,* 341 U. S. 123, 95 L. Ed. 817—(1951),

wherein the Court said at page 136 of the U. S.:

". . . An 'appropriate' governmental 'determination' must be the result of a process of reasoning. It cannot be an arbitrary fiat contrary to the known facts. This is inherent in the meaning of 'determination.' It is implicit in a government of laws and not of men. Where an act of an official plainly falls outside of the scope of his authority, he does not make that act legal by doing it and then invoking the doctrine of administrative construction to cover it."

(c) On Waiver of Immunity by "Sue or Be Sued."

In holding the actions against "sue or be sued" Federal Home Loan Banks and Federal Savings and Loan Insurance Corporation, to be unconsented suits against the United States, which must be dismissed without trial,[25] the Court of Appeals was in direct conflict with the United States Supreme Court decisions of:

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[25]The Court of Appeals so held in Appeal No. 12591, pages 52 to 55, and at page 94. (See Appx. p. 13 for Title 12, U. S. C., Sec. 1725(c)(4), and Appx. pp. 8 to 9 for Title 12, U. S. C., Sec. 1432, which render such Banks and Insurance Corporation "sue and be sued" corporations.)

(5) *Keifer v. R. F. C.*, 306 U. S. 381, 83 L. Ed. 784—(1939);

(6) *F. H. A. v. Burr*, 309 U. S. 242, 84 L. Ed. 724—(1940),

wherein the Court said at page 245 of the U. S.:

> ". . . when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue and be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be."

And

(7) *R. F. C. v. Menihan*, 312 U. S. 81, 85 L. Ed. 595—(1941),

wherein the Court said at page 85 of the U. S.:

> ". . . WE THINK THAT THE UNQUALIFIED AUTHORITY TO SUE AND BE SUED PLACED PETITIONER UPON AN EQUAL FOOTING WITH PRIVATE PARTIES AS TO THE USUAL INCIDENTS OF SUITS . . ." (Emphasis added.)

(d) On Indispensable Parties.

In holding that Home Loan Bank Board was an indispensable party,[26] without which the District Court could not adjudicate title to property physically in the registry of the Court, in possession of the Court's clerk, the Court of Appeals was in direct conflict with the United States Supreme Court decisions in:

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[26]See Appeal No. 12591, pages 49, 95 and 96.

(8) *Youngstown, Etc. v. Sawyer,* 96 L. Ed. Adv. No. 16, page 817—(June 1952),

wherein a seizure order, signed by the President himself, was held void, without the necessity of joining the President as a party defendant.

(9) *Hymes v. Grimes Packing Co.,* 337 U. S. 86, 93 L. Ed. 1231—(1949)—(affirming C. C. A.-9),

and

(10) *Williams v. Fanning,* 332 U. S. 490, 92 L. Ed. 95—(1947)—(reversing C. C. A.-9),

in which cases, unauthorized seizure by local subordinates was enjoined by the District Courts without necessity of joinder of the Washington Bureaus.

(e) On Dismissal for Failure to Complete Administrative Process.

In holding that the District Court was without jurisdiction to retain the actions pending conclusion of the administrative process,[27] the Court of Appeals' opinions are in direct conflict with the United States Supreme Court decisions of:

(11) *Far East Conference v. United States,* 342 U. S. 570, 96 L. Ed. Adv. No. 10, p. 390; Decided March 10, 1952, No. 15 Misc.,

wherein the Supreme Court said:

> "Having concluded that initial submission to the Federal Maritime Board is required, we may either ***order the case retained on the District Court docket***

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[27]On pages 382, 377, 370, 357, 355 of its opinion in Appeal No. 12511, and pages 6 and 7 of Appeal No. 12591, the Court of Appeals so held.

pending the Board's action (citing authorities), or order dismissal of the proceeding brought in the District Court . . ."

(12) *General Amer. T. Car Corp v. El Dorado Term. Co.,* 308 U. S. 422-433, 84 L. Ed. 261—(1940),

wherein the Court said at page 433 of the U. S.:

"When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination . . . There should not be a dismissal, but, as in Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 230 U. S. 247, 57 L. ed. 1472, 33 S. Ct. 916, *supra,* the cause should be held pending the conclusion of an appropriate administrative proceeding. *Thus any defenses the petitioner may have will be saved to it.*" (Emphasis added.)

See also:

El Dorado Oil Works v. United States, 328 U. S. 12, 90 L. Ed. 1053—(1946);

(13) *United States of Amer. v. I. C. C.,* 337 U. S. 426, 93 L. Ed. 1451—(1949),

wherein Justice Frankfurter said at page 464 of the U. S.:

". . . He may begin by filing his suit in court and ask the court to hold the case until he has obtained an administrative determination from the Commission. There is no jurisdictional bar to such a procedure . . . Cases . . . have clearly recognized that there is jurisdiction to hold the case and this procedure has been suggested in a number of them . . . (Citing authorities) . . ."

(14) *Thompson v. Texas Mexican R. R. Co.,* 328 U. S. 134, 90 L. Ed. 1132,—(1946),

wherein the Court said at page 151 of the U. S.:

> "Thus, however, the case may be viewed, the court below should have stayed its hand and remitted the parties to the Commission for a determination of the administrative phases of the questions involved . . . The judgment will be reversed and the cause REMANDED so that THE CASE MAY BE HELD PENDING THE CONCLUSION OF APPROPRIATE ADMINISTRATIVE PROCEEDINGS." (Emphasis added.)

(15) *Order of Railway Conductors v. Pitney,* 326 U. S. 561, 90 L. Ed. 319,—(1946).

Reversing a dismissal for failure to exhaust administrative remedies, the Court said at page 568 of the U. S.:

> ". . . The dismissal of the cause should therefore be stayed by the District Court, so as to give an opportunity for application to the Adjustment Board for an interpretation of the agreements. Any rights clearly revealed by such an interpretation might then, if the situation warrants, be protected in this proceeding."

The Court of Appeals holds that the District Court should have dismissed the action which the Supreme Court refused to dismiss; that final judgments entered by the District Court after the remand from the Supreme Court, after complete exhaustion of administrative process, and after refusal (see Appx. pp. 19 to 21) of any further administrative hearing, must, nevertheless be vacated by dismissal of the entire proceedings.

The Court of Appeals thereby holds that no power or jurisdiction can exist in any District Court to hold court proceedings pending completion of administrative process, even when administrative process is not available to many of the parties whose rights and properties are thus denied judicial protection.

(f) On Res Judicata as to Jurisdiction.

In holding that final judgments (final from prior appeals taken and dismissed) that "the court has jurisdiction of the parties and subject matter involved" are not conclusive, the Court of Appeals,[28] is in direct conflict with the United States Supreme Court decisions in:

(16) *Treinies v. Sunshine Mining Co.,* 308 U. S. 66, 84 L. Ed. 85—(1940)—(Affirming C. C. A.-9).

The Supreme Court said at page 78 of the U. S.:

> "One trial of an issue is enough. 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties." (Citing authorities.)

(17) *Stoll v. Gottlieb,* 305 U. S. 165, 83 L. Ed. 104—(1938).

The Supreme Court said at page 172 of the U. S.:

> ". . . We see no reason why a court, . . . should examine again the question whether the court

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[28]The Court of Appeals so holds on pages 379-383 of Appeal No. 12511, and pages 6, 7, and 99 of Appeal No. 12591.

making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation . . ."

(18) *Baldwin v. Iowa Traveling Men's Etc.,* 283 U. S. 522, 75 L. Ed. 1244—(1931).

The Supreme Court said at page 525 of the U. S.:

". . . It had also the right to appeal from the decision of the Missouri district court, . . . It elected to follow neither of those courses, but, after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.

"Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties . . ."

(19) *Dugas v. American Surety,* 300 U. S. 414, 81 L. Ed. 720—(1937).

The Supreme Court said at page 425 of the U .S.:

". . . No appeal was taken from either decree. Therefore Dugas was bound by both decrees. Had he exercised his right to appeal he could have obtained a review of the rulings on his objection to being brought into the suit, . . . But these rulings were all made in the exercise of the court's jurisdiction, were subject to challenge and re-examination only on appeal, and became conclusive on him in the absence of an appeal."

III. DIRECT CONFLICTS BETWEEN COURT OF APPEALS FOR SECOND, THIRD, SEVENTH AND DISTRICT OF COLUMBIA CIRCUITS.

The Court of Appeals for the Ninth Circuit holds,[29] in this case, that is impossible for a cross-claim (in interpleader, or otherwise) to state a claim upon which relief can be granted, if the original complaint of the plaintiffs does not state a cause of action.

This holding is in direct conflict with the holdings of the Second, Third, Seventh, and District of Columbia Circuit Courts of Appeals, as well as earlier cases in the Ninth Circuit. The cases are:

In the Second Circuit.

(20) *Vidal v. South American Securities Co.*, 276 Fed. 855,—(C. C. A.-2, 1922),

where, on rehearing, C. C. A.-2 reversed itself (and the District Court), and said at page 874:

> "(13, 14) As the counterclaims set up causes of action within the jurisdiction of the court as a court of equity, and within its jurisdiction as a federal court because of the citizenship of the parties, . . . they should not have been dismissed, but should have been treated as original bills upon the dismissal of the original bill . . ." (Citing authorities.)

In the Third Circuit.

(21) *Barber Asphalt Corp. v. La Fera, Etc.*, 116 F. 2d 211,—(C. C. A.-3, 1940),

wherein the Court said at page 217:

> ". . . the cause is remanded with directions to dismiss the complaint for want of equity, *to reinstate the counterclaim* and to enter judgment granting relief thereunder."

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[29]On pages 379 and 383 of the opinion in Appeal No. 12511.

In the Seventh Circuit.

(22) *Lion Mfg. Corp. v. Chicago Flexible Etc.,* 106 F. 2d 930,—(C. C. A.-7, 1939),

wherein the Court said at page 933:

". . . the dismissal of the bill of complaint did not preclude a trial and determination of the issues presented by the counterclaim and answers thereto . . ."

and in:

(23) *Railway Express v. Jones,* 106 F. 2d 341 (C. C. A.-7, 1939),

wherein the Court said at page 345:

"*By proceeding under the counterclaim* of the Railway Express *the jurisdiction of the Court will be unassailable,* and the claims of all litigants may be litigated exactly the same as in a proper class suit."

In the District of Columbia Circuit.

(24) *Isenberg v. Biddle,* 125 F. 2d 741 (C. C. A.-D. C., 1941),

wherein the Court said at page 743:

". . . when the counterclaim seeks affirmative relief, it is sustainable without regard to what happens to the original complaint . . ."

In the Ninth Circuit.

(25) *San Diego Flume Co. v. Souther,* 90 Fed. 164,—(C. C. A.-9, 1898),

wherein the court said at page 171:

"The decree dismissing the cross-bill will be set aside, and the cause remanded to the circuit court for further proceedings . . ."

See also:

(26) *Public Service Commission of the State of Missouri v. Brashear Freight Lines, Inc.,* 312 U. S. 621, 85 L. Ed. 1083—(1941);

(27) *Sunflower Oil Company v. Wilson,* 142 U. S. 313, 35 L. Ed. 1025—(1892).

Among the cross-claims and counterclaims erroneously dismissed by the Court of Appeals in the present case, were those by, or on behalf of, 8,000 homeowners, quieting their titles clouded by the seizures and commingling of seized savings deposits by respondents. The dismissal is *after* final judgments[30] based on said cross-claims.

IV. DIRECT CONFLICTS BETWEEN THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

In the present case, the Court of Appeals holds that no relief could be granted to any of the depositors, homeowners, or other parties, and all their proceedings should have been dismissed for failure of others to exhaust administrative remedies.[31]

(28) In *S. S. W. v. Air Transport,* 191 F. 2d 658,—(C. C. A., D. C., 1951):

The District of Columbia Court said at page 664:

". . . The District Court should retain jurisdiction of the antitrust suit while appellant seeks his

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[30]Final judgments from which appeals were taken and dismissed, or from which no appeals were ever taken.

[31]Pages 379-383 of Appeal No. 12511, and pages 6 and 7 of Appeal No. 12591.

> remedies from the Board . . . The District Court, which will meanwhile have retained jurisdiction of the antitrust suit, will have the benefit of these proceedings in determining the issue of antitrust violation . . ."

There is a direct conflict between the holding of the two Courts of Appeals; C. C. A. for D. C. holds that the action should be held pending the administrative process, and C. C. A.-9 holds the court action must be dismissed until exhaustion of administrative remedies available only to others.

V. DIRECT CONFLICTS BETWEEN EARLIER DECISIONS OF THE SAME CIRCUIT.

The present decision of the Court of Appeals of the Ninth Circuit is also in direct conflict with earlier decisions of the same circuit.

(29) In *Trans-Pacific Airlines v. Hawaiian Airlines,* 174 F. 2d 63—(C. C. A.-9, 1949):

The Court of Appeals for the Ninth Circuit said at page 66:

> ". . . Trans-Pacific was under the jurisdiction of the Board, and the district court had no power to interfere. The District Court of Hawaii therefore had no jurisdiction to proceed, *but should have held the cause in abeyance until the board made a primary determination* . . ." (Emphasis added.)

This earlier holding of the same Ninth Circuit Court of Appeals is in direct conflict with its present holding that the court action must be dismissed and all relief denied to the depositors, homeowners, and all other parties,

until administrative remedies are exhausted. The administrative hearings demanded in 1948 were then denied and refused by respondents. (See Appx. pp. 19 to 21.)

VI. DIRECT CONFLICT BETWEEN TWO OPINIONS OF SAME COURT OF APPEALS IN THE SAME CASES.

In holding that the Administrative Procedure Act can have no application to the Federal Home Loan Bank System, without Congressional amendment of the Federal Home Loan Bank Act,[32] the Court of Appeals' opinion in Appeal No. 12591 is in direct conflict with the holding of the same Court of Appeals in companion Appeal No. 12511, wherein the Court holds that the Administrative Procedure Act does apply to the Federal Savings and Loan System.[33]

Neither of the applicable statutes[34] have been amended by Congress. The Aministrative Procedure Act is all encompassing and permeates every administrative agency unless expressly excepted.[35]

The Court of Appeals had both statutes in mind, for it states on page 19 of its opinion in Appeal No. 12591, as follows:

> ". . . And as related legislation we may not overlook the here involved Federal Savings and Loan

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[32]Court of Appeals' opinion in Appeal No. 12591 so holds at pages 93, 95-98.

[33]The Court of Appeals' opinion in Appeal No. 12511 so holds at pages 381-383.

[34]Applicable statutes are, as to the Federal Savings and Loan System, Section 5(d) of the Home Owners' Loan Act of 1933, 48 Stats. 128, 12 U. S. C. 1461 *et seq.*, and as to the Federal Home Loan Bank System, Title 12, Sec. 1446 U. S. C. See appendix, pages 1 to 18, for text of these sections.

[35]*Wong Yang Sung v. McGrath,* 339 U. S. 33, 94 L. Ed. 616 (1950).

> Insurance Corporation or the *Home Owners Loan Act of 1933*. Where we deem it necessary we shall refer to any of the provisions of these legislative enactments." (Emphasis added.)

Yet no attempt is made in either of the opinions of the Court of Appeals to rationalize a distinction wherein amendment of one act is required, but not of another companion act, in order to make the Administrative Procedure Act applicable to either or both.

On page 351 of the opinion in Appeal No. 12511, in 196 F. 2d under the heading "The General Appearance Issue," the Court of Appeals discusses the finding of the District Court that respondents made a general appearance in the litigation, and says:

> ". . . we do not regard the issue of effective service (or non-service) on Fahey or members of Administration as controlling . . ."

and does not reverse the finding that a general appearance had been made. But on page 48 of the opinion in Appeal No. 12591, referring to the general appearance finding, the Court of Appeals says:

> "We conclude that findings of this character are clearly erroneous as a matter of law . . ."

and says on page 49:

> ". . . the presence of the Home Loan Bank Board and its members is required in this action . . ."

and orders the action dismissed because indispensable parties (the Home Loan Bank Board), were not served.

There was no different record before the Court of Appeals in Appeal No. 12591 than in Appeal No. 12511 on the question of General Appearance. Yet, in one opinion the Court of Appeals does not regard the issue as "controlling," but in the other opinion the finding is "clearly erroneous" and the action ordered dismissed. No rationalization or reconciliation of these two directly opposite positions is found in the opinions.

D. Conflicts Between Court of Appeals' Opinions and United States Statutes.

I. STAY POWER OF REVIEWING COURT NULLIFIED.

The Administrative Procedure Act, Title 5, United States Code, Section 1009, subdivision (d), reads in part:

> "(d) INTERIM RELIEF.—Pending judicial review . . . Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings."

In addition to such express statutory authority, every reviewing court has inherent power,

> ". . . to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong . . ." (*Scripps-Howard v. F. C. C.*, 316 U. S. 4, 86 L. Ed. 1229, U. S. Sup. Ct., 1942.)

On page 367 of 196 F. 2d of the opinion of the Court of Appeals in Appeal No. 12511, the Court states:

> ". . . the reviewing court would have ample authority to preserve the status of all parties . . ."

and on pages 382 and 383 of 196 F. 2d, Appeal No. 12511, the Court of Appeals holds the Administrative Procedure Act provisions,

> ". . . were immediately applicable to the pending suits of the Mallonee-Association group of litigants, . . ."

The original pleadings allege an immediate threat to merge, dissipate, and break up the Federal Savings Association, so as to prevent any court review, or recovery of the seized Association or assets [R. 18-19, Apl. 12511].

The District Court in 1947, after the remand from the United States Supreme Court in 1947, found that respondents:

> ". . . intended to merge or consolidate the Long Beach Federal Savings and Loan Association with other financial institutions and did intend thereby to destroy its identity . . . and thus render moot the questions presented in this litigation, . . ." [R. 2355-2358, Apl. 12511.]

Respondents took appeals from these findings. In 1948, the appeals were dismissed.

The District Court in its 1949 injunction, found the injunction was a necessary and appropriate process to preserve the status and existence of the Federal Savings Association, pending the Court's review of the 1946 seizures [R. 8274, Apl. 12511].

Notwithstanding its holding that the Administrative Procedure Act applies to these seizures, and that the re-

viewing courts have full authority to preserve the status of the parties,[36] the Court of Appeals reverses and vacates the District Court's preliminary injunction; holds that none of the pleadings of any of the parties can state any claim for relief; that all actions should be dismissed immediately, and thereby nullifies and repeals the power expressly conferred on the reviewing courts by the Administrative Procedure Act.

Such dismissal would have vacated the opinion of the three-judge statutory court of September 5, 1946, and deprived the Supreme Court of all appellate jurisdiction to decide *Fahey v. Mallonee*.

Why the Administrative Procedure Act becoming effective should require immediate dismissal without trial of actions for judicial stay pending review of unconstitutional administrative seizures, does not appear.

E. $7,000,000.00 Denied Debt Foreclosed Without Trial.

Among the securities on deposit in interpleader with the District Court, are four notes, with a combined face of $6,300,000.00, which, with accrued interest, aggregates $7,000,000.00 [R. 8420-8421, Apl. 12511].

In 1946 and 1948, pleadings in the original case sought to cancel as fraudulent, void, and without consideration, the said notes and debt. In 1952, respondents filed another suit (removed to the same District Court) to foreclose the same four notes and $14,000,000.00 in Government bonds and deeds of trust, alleged security therefor. The $14,000,000.00 is part of the savings deposits of

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[36]Page 367 of 196 F. 2d, opinion in Appeal No. 12511.

petitioners' 16,000 shareholder depositors, interpled and in the registry of the District Court.

Petitioners did not sign the notes, nor receive the loaned money. They deny all liability for the debt [R. 286-302, 4172-4173, Apl. 12511]. These issues have never been tried by the District Court [R. 8249-8256, 8272, 8274, Apl. 12511], yet the Court of Appeals' opinion in Appeal No. 12591, on page 99, referring to the four notes evidencing the $7,000,000.00 debt, holds they are:

> ". . . a valid indebtedness due the San Francisco Bank . . ."

and on page 19:

> ". . . If the Federal Home Loan Bank of San Francisco was lawfully established by the Board, it necessarily follows that the lien of San Francisco (which arose from and was founded upon the notes of Association executed by Ammann) must be satisfied from and out of the impounded funds."

On page 383 of 196 F. 2d, opinion in Appeal No. 12511, the Court of Appeals states in part:

> ". . . Los Angeles correctly insists that the issues in the Los Angeles action have not been adjudicated by the lower court . . . For reasons later stated, we agree with this contention."[37]

After agreeing that factual issues, including denial of the debt—"have not been adjudicated by the lower court," without any trial or evidence the Court of Appeals proceeds to itself adjudicate, without trial, the very issues it will not permit the District Court to try.

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[37]On page 29 of Opinion in Appeal No. 12591, the Court of Appeals says: "Since the Los Angeles Bank action has not been tried . . ."

If the District Court was "without jurisdiction of the subject matter," and therefore could not decide disputed issues of fact, the Court of Appeals, which has only appellate jurisdiction, cannot decide those untried issues nor make its decision thereof *res judicata* against petitioners' savings deposits.

F. Accounting Prevented.

$26,000,000.00[38] of uncounted cash, bearer bonds, and negotiable securities, were seized [R. 21-23, 8614-8743, 9494, Apl. 12511]. Demands for receipts were refused [R. 7-8, 336-338, 460, Apl. 12511]. After nearly two years, an accounting was ordered both by Administrative Order [R. 8231-8233, 8310-8327, 3404-3405, 3409-3420, Apl. 12511], of respondents[39] and final judgment of the District Court [R. 8310-8328, Apl. 12511].

The first accounting was rejected by the District Court as inadequate [R. 8987-8996, Apl. 12511].

The depositors, whose savings were seized, have pending multi-million dollar objections to the second inadequate accounting [R. 8614-8743, Apl. 12511. Similar objections to the second attempted accounting were filed with the District Court subsequent to the printing of the record on appeal].

Four years after the judgment requiring the accounting has become final, the Court of Appeals orders the actions dismissed. Trial of the disputed accounting is

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[38]All figures are approximate.

[39]By the express terms of respondents' own order, No. 388, the accounting was to be filed with the District Court as was a certified copy of respondents' order requiring the accounting. For text of Order No. 388, see appendix, page 34, and R. 8231-8232, footnote 7, Vol. XVIII, Appeal No. 12511.

thereby prevented, and what became of the depositors' seized savings will never be ascertained, unless the Supreme Court grants certiorari. Accountability of Government Officials for seized savings is an issue, as yet undecided by the United States Supreme Court, of vital importance to the entire Federal Savings System.

G. Insurance of Savings Deposits Nullified.

Petitioners, as insured savings depositors, seek court enforcement of respondents' insurance of their savings deposits [R. 6639-6717, Apl. 12511]. Over $120,000.00 insurance premiums were paid for respondent Federal Savings and Loan Insurance Corporation's insurance and guarantee of $22,000,000.00 of savings deposits of 16,000 depositors [R. 8266, Apl. 12511].[40]

Suit by the depositors for declaratory relief and to collect the insurance on the seized savings deposits is held, by the Court of Appeals, not to state a claim upon which any relief can be granted to the insured savings depositors. (196 F. 2d 336 at p. 370.)

If payment of insured savings deposits is dependent upon "generosity" of Government Officials, and is NOT an enforceable contract right, the more than 6,000,000 Government insured savings depositors should be so informed by a United States Supreme Court decision to that effect.

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[40]Successive semi-annual deposits of additional insurance premiums have been made to the clerk of the District Court since closing of the record on appeal. The aggregate of such deposits exceeds $120,000.00.

Conclusion.

The direct conflicts between the present opinions in the Court of Appeals and:

1. Former United States Supreme Court decisions in these same cases in 1947,

2. Other recent decisions of the United States Supreme Court,

3. The Courts of Appeals for the Second, Third, Seventh, and District of Columbia Circuits,

4. Earlier opinions of the Ninth Circuit,

5. The two opinions in the same cases, and

6. The express terms of,

   (a) The Federal Home Loan Bank Act,

   (b) The Federal Savings and Loan Insurance Corporation statutes, and

   (c) Administrative Procedure Act,

   all require United States Supreme Court review for clarification and uniformity.

In addition, the important questions of federal law, vitally affecting $10,000,000,000.00 of deposited savings, all questions of first impression, imperatively require authoritative and immediate decision by the United States Supreme Court.

Such necessity is recognized in the concurring opinion of Justice Stephens (p. 391 of 196 F. 2d), wherein he said:

> ". . . The whole subject matter from the beginning presented highly difficult legal questions, solvable in certainty only by the court with the last say . . ."

The protection of the $10,000,000,000.00 savings deposited by 6,000,000 depositors in reliance upon Government insurance of a Federal Savings System, cries for United States Supreme Court review of the dangerous conflicts and manifest injustices of the two opinions of the Court of Appeals.

The reversal of the Supreme Court mandate by the Court of Appeals' opinions, after five years reliance on that mandate, by the District Court and the litigants, is alone error enough to require certiorari.

The thousands of homeowners who paid in full to the District Court the millions of dollars due on the loans on their homes, in reliance on the United States Supreme Court's mandate, must not lose, both their money and the titles to their homes, cleared and quieted by final judgments.

Respectfully submitted,

CHARLES K. CHAPMAN,

Attorney for Petitioner Long Beach Federal Savings and Loan Association,

and

WYCKOFF WESTOVER,

Attorney for Petitioner Mallonee, et al. (Shareholders' Protective Committee).

Appendix Reference.

To prevent repetition in the several petitions for certiorari, a combined appendix by certain petitioners is filed herewith, bound as a separate volume. All appendix references in this petition are to such bound appendix.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of February, A. D. 1953.

2-3-53—150

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IN THE

Supreme Court of the United States

October Term, 1952
No. 592

WILMINGTON FEDERAL SAVINGS & LOAN ASSOCIATION, and W. I. GILBERT, JR., for themselves and on behalf of FEDERAL HOME LOAN BANK OF LOS ANGELES, and its stockholders,
Petitioners,

vs.

HOME LOAN BANK BOARD, WILLIAM K. DIVERS, O. K. LAROQUE, J. ALSTON ADAMS, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, JOHN H. FAHEY, A. V. AMMANN and GEORGE K. BRAMLEY,
Respondents and Appellants Below.

Petition of Wilmington Federal Savings & Loan Association and W. I. Gilbert, Jr., for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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SUBJECT INDEX.

PAGE

Petition of Wilmington Federal Savings & Loan Association and W. I. Gilbert, Jr., for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit 1

Summary of the matters involved 2

Seizure of the Los Angeles Bank 2

Seizure of Long Beach Association and action by its stockholders 4

Institution of the Mallonee action 4

Legal steps by Los Angeles Bank and stockholders 4

Decision of the Supreme Court in Mallonee v. Fahey 6

Consolidation of the Los Angeles action and the Mallonee action 6

Restoration of Long Beach Association to the stockholders 7

Proceedings in interpleader and deposits in court 7

Negotiations for settlement 7

Long Beach Association again threatened with seizure 8

District Court enjoins all proceedings threatening to interfere with its jurisdiction and Court of Appeals reverses that order 8

Order for interim attorneys' fees made by the District Court and reversed by Court of Appeals 9

Court of Appeals dismisses Los Angeles action 10

Jurisdictional statement 11

(a) Jurisdiction of the Supreme Court 11

(b) Jurisdiction of the United States District Court 11

Questions presented 12

Reasons relied on for allowance of writ 14

PAGE

Brief in support of petition for writ of certiorari 19

Opinions of courts below 19

Jurisdiction 19

Statutes involved 20

Statement of the case 21

Specification of errors 21

Argument 22

I.

Are Federal Home Loan Banks institutions which exist at the whim and pleasure of respondents, and do the stockholders of such banks have any proprietary or justiciable rights as stockholders of these institutions? 22

(a) May Federal Home Loan Banks be dissolved and liquidated instantly at the whim and pleasure of respondents? 22

(b) Do stockholders of Federal Home Loan Banks have proprietary or justiciable rights as stockholders of such institutions? 23

II.

The District Court had jurisdiction over the subject matter of the Los Angeles and Mallonee actions, there being allegations that they involve constitutional and Federal questions 25

III.

The District Courts had jurisdiction to try the issue that ill-will and malice actuated the supervising authorities, that is, that they exercised constitutional powers in an unconstitutional way 27

PAGE

IV.

The District Court had jurisdiction to inquire whether Orders 5082-5084 had the effect of transferring the assets of the Los Angeles Bank to the San Francisco Bank 30

(a) The court had power to review under the law as it existed before the Administrative Procedure Act.. 30

(b) The Administrative Orders in question are reviewable under the Administrative Procedure Act..... 31

(c) Particulars in which respondents, in issuing Orders 8052-8054 failed to follow the Federal Home Loan Bank Act 32

(1) "May be liquidated or reorganized"..... 33

(2) "And its stock paid off and retired in whole or in part in connection therewith"..... 34

(3) "After paying or making provision for the payment of its liabilities"..... 35

(4) "Any other Federal Home Loan Bank may with the approval of the Board acquire assets of any such liquidated or reorganized bank"..... 35

(5) "The Board may, after hearing, remove any member from membership"..... 37

(d) Although the redistricting and liquidating action may have been legislative, the question whether that power was properly exercised was not a non-justiciable one 38

V.

The District Court had jurisdiction over all parties..... 43

(a) The District Court acquired jurisdiction over the defendants in the Los Angeles action under 28 U. S. C., Sec. 118 (now Sec. 1655)..... 43

PAGE

(b) The filing of Order No. 388 in the District Court constituted a general appearance of respondents..... 44

(c) Even if not all parties were before the court, the record was ripe for adjudication in their absence.... 45

(d) The District Court also had jurisdiction over all the parties respondent by reason of its interpleader jurisdiction 46

VI.

Since the District Court had jurisdiction, the right to issue an injunction existed under its equity powers in cases involving 28 U. S. C. 118 (now 1655), under the provisions of the Administrative Procedure Act, and under the Interpleader Act..... 47

VII.

The United States District Court had power to award interim fees to the attorneys for the Los Angeles Bank and for the stockholders, including Wilmington, plaintiffs in the class action..... 52

Conclusion 55

TABLE OF AUTHORITIES CITED

CASES	PAGE
Alexander v. Hillman, 296 U. S. 222, 80 L. Ed. 192	45
Anderson v. Great Republic Life Ins. Co., 41 Cal. App. 2d 181	55
Barnes v. Newcomb, 89 N. Y. 108	55
Buck v. Kleiber Motor Co., 98 F. 2d 903	33
Butterworth v. Boyd, 12 Cal. 2d 140, 82 P. 2d 434, 126 A. L. R. 838	29
Commissioner v. Kitselman, 89 F. 2d 458	34
Dismuke v. United States, 297 U. S. 167, 80 L. Ed. 561, 56 S. Ct. 400	28
Dugas v. Amer. Surety Co., 300 U. S. 419, 81 L. Ed. 720	50
Dwinell-Wright Co. v. National Fruit Product Co., Inc., 129 F. 2d 848	50
Edgill v. Felder, 84 Fed. 69	45
Eggert v. Pacific States Savings and Loan Co., 53 Cal. App. 2d 554	55
Estep v. United States, 327 U. S. 114, 90 L. Ed. 567	30, 38
Fahey v. Mallonee, 332 U. S. 245, 91 L. Ed. 2030	15, 26, 27, 28
Federal Reserve System v. Agnew, 329 U. S. 441, 91 L. Ed. 408	28
Feldman v. Coon Ins., 78 F. 2d 838	45
Harvey v. Harvey, 290 Fed. 653	48
Heaton v. Jackson, 34 Ohio App. 424, 171 N. E. 364	40
Inland Steel Co. v. N. L. R. B., 109 F. 2d 9	27
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 95 L. Ed. 817	30
Knights, etc. Inc. v. Francis, 79 Cal. App. 383	37
LeTulle v. Schofield, 308 U. S. 415	34
Merchants, et al. v. Clow, 204 U. S. 288, 51 L. Ed. 488	45
Monaghan v. Hill, 140 F. 2d 31	55

PAGE

Myles Salt Co. v. Bd. of Commissioners, 239 U. S. 478, 60 L. Ed. 392 41
National Labor Relations Board v. Phelps, 136 F. 2d 562 27
National Labor Relations Board v. Pittsburgh Steamship Company, 340 U. S. 498, 95 L. Ed. 479 32
National Surety Co. v. Sand Springs State Bank, 177 Pac. 574 34
Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158 54
Prudential Ins. Co. v. Small Claims Ct., 76 Cal. App. 2d 379, 173 P. 2d 38 53
Railroad Commission of California v. Pacific Gas & Electric Co., 302 U. S. 388, 82 L. Ed. 319 26
Roberts v. Anderson, 66 F. 2d 874 53
Scott v. Donohue, 93 Cal. App. 126 37
Social Security Board v. Nierotko, 327 U. S. 358, 90 L. Ed. 718 31
Sprague v. Ticonic Bank, 307 U. S. 161 54
St. Joseph's Stockyards Co. v. United States, 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720 30
Sterling v. Constantin, 287 U. S. 387, 77 L. Ed. 375 .....26, 27
Sterling Tire Company v. Sullivan, 279 Fed. 336 45
Texas & P. R. Co. v. Eastin, 214 U. S. 153, 53 L. Ed. 947 45
Treinies v. Sunshine Mining Co., 308 U. S. 64, 84 L. Ed. 85 47
Trustees v. Grenough, 105 U. S. 527 54
United Light & Power Co. v. Commissioner, 105 F. 2d 866 34
United States v. Morgan, 83 L. Ed. 1211, 307 U. S. 183 28
United States v. United Mine Workers of America, 91 L. Ed. 884, 330 U. S. 258 .....37, 47
Universal Camera Corp. v. N. L. R. B., 340 U. S. 474, 95 L. Ed. 456 32
Winslow v. Ferguson, 25 Cal. 2d 274 55
Wong Yang Sung v. McGrath, 339 U. S. 33, 94 L. Ed. 616 ....30, 31
Youngstown, etc. v. Sawyer, 96 L. Ed. Adv. No. 16, pp. 8-9 45 45

STATUTES

	PAGE
Act of July 22, 1932, Chap. 522, Sec. 26, 47 Stat. 740	32
Administrative Procedure Act, Sec. 9	50
Administrative Procedure Act, Sec. 9(d)	50
Executive Order No. 10340	46
Federal Home Loan Bank Act, Sec. 3	11
Federal Home Loan Bank Act, Sec. 12	11, 34, 35, 36
Federal Home Loan Bank Act, Sec. 17	11
Federal Home Loan Bank Act, Sec. 25	11, 36
Federal Home Loan Bank Act, Sec. 26	11
Federal Home Loan Bank Board Administrative Order No. 388	7, 13, 21, 44
Federal Home Loan Bank Board Administrative Order No. 2015	8, 13, 21, 31
Federal Home Loan Bank Board Administrative Order No. 5082	2, 5, 12, 21, 30, 31, 33, 34, 35, 39, 43
Federal Home Loan Bank Board Administrative Order No. 5083	2, 5, 12, 21, 31, 33, 39, 43
Federal Home Loan Bank Board Administrative Order No. 5084	2, 5, 12, 21, 30, 31, 33, 39, 43
Federal Home Loan Bank Board Administrative Order No. 5254	21
Federal Home Loan Bank Board Administrative Orders Nos. 8052-8054	32, 38
Federal Rules of Civil Procedure, Rule 22	11, 47
Home Owners' Loan Act, Sec. 5(d)	4, 6, 26
Judicial Code, Sec. 57	21, 26, 49
United States Code, Title 5, Secs. 1001-1011	11, 20, 31
United States Code, Title 5, Sec. 1003	38
United States Code, Title 5, Sec. 1009	50
United States Code, Title 12, Secs. 1421-1449	11, 20, 26
United States Code, Title 12, Secs. 1421-1499	26
United States Code, Title 12, Sec. 1423	23

PAGE

United States Code, Title 12, Sec. 1424 25
United States Code, Title 12, Sec. 1426(b) 24
United States Code, Title 12, Sec. 1426(i) 37
United States Code, Title 12, Sec. 1432 ..... 34, 43
United States Code, Title 12, Sec. 1445 36
United States Code, Title 12, Sec. 1446 ..... 23, 32
United States Code, Title 12, Secs. 1461-1468 ..... 4, 11, 20, 26
United States Code, Title 12, Sec. 1464(f) 24
United States Code, Title 28, Sec. 41(26) 11
United States Code, Title 28, Sec. 118 ..... 11, 13, 21, 26, 48, 49
United States Code, Title 28, Sec. 380(a) 4
United States Code, Title 28, Sec. 1254 11
United States Code, Title 28, Sec. 1254(1) 20
United States Code, Title 28, Sec. 1335 ..... 11, 21, 47
United States Code, Title 28, Sec. 1347 11
United States Code, Title 28, Sec. 1397 ..... 21, 47
United States Code, Title 28, Sec. 1655 ..... 11, 13, 21, 22, 43, 48
United States Code Annotated, Title 28, Sec. 2361 ..... 11, 21, 47, 50
United States Constitution, Art. III, Sec. 2 25
United States Constitution, Fifth Amendment 5, 11, 25

TEXTBOOKS

42 American Jurisprudence, pp. 611-617 ..... 28, 39
65 American Law Reports, pp. 523, 1529 40
135 American Law Reports, p. 1096(4) 40
11 Fletcher, Cyclopedia of Corporations (Rev. and Term Ed. 1932, p. 93, Notes 8, 9 53

IN THE

Supreme Court of the United States

October Term, 1952

No. .....

WILMINGTON FEDERAL SAVINGS & LOAN ASSOCIATION, and W. I. GILBERT, JR., for themselves and on behalf of FEDERAL HOME LOAN BANK OF LOS ANGELES, and its stockholders,

Petitioners,

vs.

HOME LOAN BANK BOARD, WILLIAM K. DIVERS, O. K. LAROQUE, J. ALSTON ADAMS, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, JOHN H. FAHEY, A. V. AMMANN and GEORGE K. BRAMLEY,

Respondents and Appellants Below.

Petition of Wilmington Federal Savings & Loan Association and W. I. Gilbert, Jr., for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Wilmington Federal Savings & Loan Association, for itself, as well as on behalf of the Federal Home Loan Bank of Los Angeles and its stockholders, and W. I. Gilbert, Jr., pray that writs of certiorari issue to review the orders and judgments entered November 13, 1952, in Appeal No. 12511 and December 19, 1952, in Appeal No. 12591 in the United States Court of Appeals, Ninth Circuit. The appeals are entitled:

No. 12511

Home Loan Bank Board, *et al.*, Appellants vs. Mallonee, *et al.*, Appellees, and

No. 12591

Federal Home Loan Bank of San Francisco, *et al.*, Appellants vs. Federal Home Loan Bank of Los Angeles, *et al.*, Appellees.

Petitioners respectfully represent as follows:

Summary of the Matters Involved.

On March 29, 1946, there existed at Los Angeles, California, the Federal Home Loan Bank of Los Angeles. In this petition it is called Los Angeles Bank. It had been founded in 1932 under the Federal Home Loan Act (12 U. S. C. A. 1421-1449), with an initial capital of $10,000,000.00 [R. 4559].* It was solvent and prosperous! In fourteen years its capital had grown to $46,000,000.00 [R. 3198]. Its surplus was approximately $1,900,000.00. It had never been accused of misconduct or wrongdoing.

Seizure of the Los Angeles Bank.

On the forenoon of March 29, 1946, without prior notice, respondents entered the premises of Los Angeles Bank and took possession of it and its assets [R. 9107-9191, 9465-9501]. As authority for the seizure, respondents produced certified copies of Federal Home Loan Bank Board Administrative Orders Nos. 5082, 5083 and 5084 [App. pp. 28 to 32].**

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*Where not otherwise noted, the references are to the record in Appeal No. 12511.

**This reference and all others marked App. are to a separately printed appendix filed herein on behalf of several petitioners.

These orders dissolved and liquidated the Los Angeles Bank without notice, hearing, trial or accusation and merged it instantaneously and summarily with, and immediately transferred its assets to, the Federal Home Loan Bank of Portland, referred to herein as the Portland Bank, whose president was present to receive the assets [R. 8225]. The merged institutions were then reconstituted as the Federal Home Loan Bank of San Francisco. We shall refer to it herein as the San Francisco Bank.

The seizure orders had been drawn in Washington, D. C., and transported to Los Angeles. They had been kept secret until they could be issued simultaneously in Washington and enforced in Los Angeles. Respondents testified before a congressional investigating committee that the secrecy was essential to prevent Los Angeles Bank from resisting the seizure in the courts [R. 9140]. The Portland Bank, however, received sufficient notice from respondents to be present and receive the seized assets.

Long Beach Federal Savings and Loan Association, hereinafter referred to as "Long Beach Association," owned stock in Los Angeles Bank of a par value of $340,000.00, and an actual value of approximately $400,000.00 [R. 3248]. The Los Angeles Bank also held for Long Beach Association $8,300,000.00 in United States Government bonds for safekeeping [R. 8402].

The president of Long Beach Association was one of the directors of the Los Angeles Bank. He spearheaded immediate endeavors for the return of the Bank [R. 4556].

Seizure of Long Beach Association and Action by Its Stockholders.

Thereupon, on May 20, 1946, John H. Fahey, relying on Section 5(d) of the Home Owners' Loan Act (12 U. S. C. 1461-1468), without hearing and notice, seized the Long Beach Association, and put respondent Ammann, who had signed the seizure orders of both the Los Angeles Bank (App. 32) and Long Beach Association in possession as conservator [R. 8229].

Institution of the Mallonee Action.

Certain shareholders of Long Beach Association reacted to these seizures with the institution, on May 27, 1946, of a class suit entitled *"Paul Mallonee, etc., et al. v. John H. Fahey"* [R. 1]. In it, they asked, under Section 380(a), Title 28 of the Judicial Code, for a hearing before three judges to test the constitutionality of Section 5(d) of the Home Owners' Loan Act. We shall refer to this action as the *Mallonee* action.

On July 1, 1946, Long Beach Association filed a third party complaint in the *Mallonee* action, bringing the seized Los Angeles Bank into it as a third party defendant, and alleging, among other things, that the seizure of the Los Angeles Bank was unconstitutional, arbitrary and unlawful [R. 294].

Legal Steps by Los Angeles Bank and Stockholders.

Los Angeles Bank and its stockholders, faced with its seizure and the third party complaint of Long Beach Association, took three steps.

1) Los Angeles Bank, on August 22, 1946, filed a suit entitled, *"Federal Home Loan Bank of Los Angeles v. Federal Home Loan Bank of San Francisco, et al."*

hereafter referred to as the *Los Angeles* action. Six stockholders, representing all stockholders, joined the Los Angeles action. Your petitioner, for brevity referred to as Wilmington, is one of these [R. 9465-9501]. The second count in the *Los Angeles* action is, consequently, a class action.

The allegations of the *Los Angeles* action are, in short, that the seizure of the Los Angeles Bank was in violation of the Fifth Amendment, "wholly punitive and disciplinary and not otherwise" [R. 9480], and "unlawful, void and in excess of the authority vested in the Commissioner by law, and an arbitrary abuse of discretion on his part amounting to fraud in law upon the rights of the plaintiffs" [R. 9480-9484]. The complaint was entitled as one "to enforce legal and equitable claims, to obtain possession of and to remove liens from and clouds upon title to, property," etc. [R. 9466]. The prayer [R. 9493-9495], asked that the court adjudge that orders 5082, 5083 and 5084 had no effect upon the Los Angeles Bank and did not accomplish a transfer of its assets to the respondent institutions, and that possession should be returned and title to the assets quieted in the Los Angeles Bank.

2) Los Angeles Bank also filed an answer to the third party complaint of Long Beach Association [R. 592], in which it conceded those allegations of the third party complaint, which said that it had been unlawfully, arbitrarily and improperly seized.

3) To clarify its position, the Los Angeles Bank also filed a cross-claim in the *Mallonee* action. Its allegations are identical with those of the first cause of action in the Los Angeles action [R. 564].

Decision of the Supreme Court in Mallonee v. Fahey.

The *Mallonee* action was thereafter heard before a three-judge constitutional court. It decided that the summary seizure provisions of Section 5(d) of the Home Owners Loan Act were unconstitutional.

This decision was reversed by this Honorable Court on June 23, 1947. (332 U. S. 245, 91 L. Ed. 2030.) The opinion of the court said:

> "It is obvious that there is more to this litigation than meets the eye on the pleadings. The plaintiffs' charges that ill will and malice actuated the supervising authorities * * * are * * * undetermined by the courts below, * * *.
>
> Our decision is * * * without prejudice to any other administrative or judicial proceedings which may be warranted by law. The judgment is reversed." (91 L. Ed. 2041.)

In the light of this language, the trial court retained jurisdiction to decide the issues left open by the above language.

Consolidation of the Los Angeles Action and the Mallonee Action.

Since pertinent issues were common both to the *Los Angeles* and the *Mallonee* action, and since the two causes had become inextricably intertwined by cross-claims, third party complaints and interpleaders, the court, on November 7, 1947, made an order consolidating the two actions for all purposes [R. 2788].

Restoration of Long Beach Association to the Stockholders.

On January 23, 1948, respondents issued Order No. 388 restoring the Long Beach Association to its stockholders and management (App. 34-35). This order was presented to the District Court in the consolidated actions and approved by order of the District Court [R. 8310-8327].

Proceedings in Interpleader and Deposits in Court.

Many proceedings in interpleader in the *Mallonee* action had preceded the consolidation and many followed in the form of third party claims, complaints in intervention, motions, orders to show cause, etc. Over fifty judgments and orders were rendered in these subsidiary proceedings. All of them have become final, some without appeal, and in others appeals were taken but later dismissed.

As a result of these numerous proceedings and incident thereto, promissory notes, cash and bonds were deposited in the registry of the District Court, partly before the restoration of Long Beach Association, partly afterwards. The parties, among them Long Beach Association, felt that they could not safely decide for themselves whether the Los Angeles Bank or the San Francisco Bank or other claimants were entitled to these assets. The sum so accumulated and now awaiting disposition, amounts to more than $14,000,000.00.

Negotiations for Settlement.

Order 388 restoring the Long Beach Association to its management did not disentangle all matters presented by the consolidated actions. Negotiations for settlement of the remaining issues followed. When, in August, 1949, no solution was in sight, your petitioner Wilmington

moved in the District Court in the consolidated actions on behalf of all stockholders for a report on the progress of the settlement negotiations [R. 7141]. Various feasible plans for settlement had been proposed but respondents had rejected them [R. 7335], in spite of previous professions of intention to terminate the litigation and to restore the Los Angeles Bank [R. 7422].

Long Beach Association Again Threatened With Seizure.

The petition of Wilmington did not bring about the desired report. On the contrary, it precipitated new steps by respondents to again seize the Long Beach Association. On September 9, 1949, they directed it by their order No. 2015 to appear in Washington for a new administrative hearing why it should not be put into the hands of a receiver's and its affairs liquidated (App. 26).

District Court Enjoins All Proceedings Threatening to Interfere With Its Jurisdiction and Court of Appeals Reverses That Order.

This new order threatened to interfere with the disposition of those matters which, under the opinion of Supreme Court previously quoted, were left to the District Court and with the disposition of similar matters raised by the Los Angeles action. It further threatened to interfere with the disposition of numerous interpleaders in the consolidated actions, and with the orderly judicial administration of funds in excess of $14,000,000.00 which had been interpled in the registry of the court to abide the outcome of the judicial proceedings. For that reason, and upon motions and orders to show cause, the United States District Court, after an all-night hearing [R. 8286, 11174], made extensive findings [R. 8212-8294]

and issued an interlocutory injunction enjoining respondents, petitioner Wilmington and numerous other parties [R. 8304-8305] from interfering with or circumventing the jurisdiction, orders, judgments and injunctions of the District Court, either by holding administrative hearings or participating therein, or by interfering with Long Beach Association, or by interfering with the jurisdiction of the court, by instituting, participating in, or getting others to participate in any actions in any court other than the District Court, relating to any of the monies, properties or assets involved in or claimed by the parties to the consolidated action, and interfering with the jurisdiction of the District Court over the funds and assets deposited and interpleaded in the District Court or in the registry thereof [R. 8306-8309].

The Home Loan Bank Board and Federal Home Loan Bank of San Francisco took an appeal (No. 12511) from this interlocutory injunction to the Ninth Circuit which, on April 2, 1952, reversed the injunction. This decision is reported in 196 F. 2d pp. 336 to 391. Petitions for rehearing were filed and thereafter denied by the court on November 13, 1952.

Order for Interim Attorneys' Fees Made by the District Court and Reversed by Court of Appeals.

In the meantime, the attorneys for the Los Angeles Bank, and petitioner W. I. Gilbert, Jr., as attorney for petitioner Wilmington, had participated in many hearings and proceedings in the consolidated actions. The class plaintiffs, especially Wilmington, being put in fear by respondents [Appeal 12591, R. 295] that an appropriation of money for attorneys' fees out of its funds for the prosecution of the class suit to obtain the restora-

tion of the Los Angeles Bank, would bring upon it a fate similar to that which had befallen Long Beach Association when its president took the initiative in that direction, applied to the court for an allowance of interim attorneys' fees. After all, some of their assets had been deposited with the Los Angeles Bank, and swept into the San Francisco Bank by the seizure orders and later, by various interpleaders, into the registry of the court. The court allowed interim fees to the attorneys for the Los Angeles Bank and to the attorney for Wilmington. The findings supporting the order for allowance of fees recite in detail the facts which justified the fear of all federal building and loan institutions that respondents would seize them if they appropriated money for the prosecution of the Los Angeles action [Appeal 12591, R. 295]. Respondents, dissatisfied also with that order, took appeal, No. 12591. On November 6, 1952, the Court of Appeals reserved the order allowing attorneys' fees.

Petitions for rehearing were filed, but on December 17, 1952, they were likewise denied.

Court of Appeals Dismisses Los Angeles Action.

The opinion of the Court of Appeals in the interim attorneys' fees appeal did not stop with a reversal of the order for fees, but ordered that the Los Angeles action be remanded "with directions to the lower court to dismiss the Los Angeles action" (Opinion Appeal No. 12591, p. 101).

Jurisdictional Statement.

(a) Jurisdiction of the Supreme Court.

This Honorable Court has jurisdiction to pass on petitions for certiorari under 28 U. S. C. 1254.

(b) Jurisdiction of the United States District Court.

(1) In the *Mallonee* action, jurisdiction of the United States District Court is alleged to rest on the Fifth Amendment to the Constitution, the Home Owners' Loan Act of 1933 (12 U. S. C. 1461-1468), the Federal Home Loan Bank Act (12 U. S. C. 1421-1449), and rules and regulations adopted in connection with it. Jurisdiction is further claimed to rest on 28 U. S. C. 118 (presently Sec. 1655); also on the interpleader statutes, 28 U. S. C. 41, Section 41, Subd. 26 (presently 28 U. S. C. 1335, 1347, 2361), Rule 22, of Federal Rules of Civil Procedure; also under the Administrative Procedure Act, 5 U. S. C. 1001 to 1011.

(2) In the *Los Angeles* action, jurisdiction arises under the Fifth Amendment to the Constitution, under 28 U. S. C. 118 (presently Sec. 1655) and under various provisions of the Federal Home Loan Bank Act, more particularly Sections 3, 12, 17, 25 and 26 (12 U. S. C. 1421 to 1449).

Questions Presented.

1. Are Federal Home Loan Banks institutions which exist at the whim and pleasure of the respondents, and do the stockholders of such banks have any proprietary or justiciable rights as stockholders of these institutions?

2. Where litigation is started in the District Court alleging the unconstitutional seizure by respondents of a solvent and prosperous savings and loan association and the seizure and liquidation of a Federal Home Loan Bank in violation of the Constitution and the Federal Home Loan Bank Act, do these allegations present a justiciable issue of which the District Court has jurisdiction?

3. Did the action of respondents in seizing the Los Angeles Bank by Orders Nos. 5082, 5083 and 5084, even if legislative in character, amount to an unconstitutional use of constitutional power and was it "unlawful," "void," "wholly punitive" and not otherwise, and an "arbitrary abuse of discretion . . . amounting to fraud in law"? If the orders were thus tainted, were they nevertheless effective to dissolve the Los Angeles Bank and to transfer its assets to another Federal Home Loan Bank?

4. Where a complaint alleges that respondents, in liquidating a Federal Home Loan Bank and transferring its assets to a different Home Loan Bank failed to follow the Federal Home Loan Bank Act, does a United States District Court have jurisdiction to determine that question?

5. Did the District Court have jurisdiction over respondents

(a) in the Los Angeles action under 28 U. S. C. 118 (now Sec. 1655),

(b) by reason of the filing of their Order 388 in the District Court, amounting to a general appearance,

(c) because of the District Court's interpleader jurisdiction,

(d) because, even if some of the respondents were not before the court, the Record was otherwise ripe for adjudication?

6. Did the District Court have jurisdiction to issue, in the consolidated actions, a preliminary injunction restraining the administrative hearing scheduled by respondents under Order No. 2015

(a) until it had decided whether ill-will and malice had prompted respondents in the seizure of Long Beach Association and Los Angeles Bank, and

(b) until it had decided the numerous interpleader actions, brought about by these seizures.

7. Where the assets of a seized Federal Home Loan Bank are transferred by the administrative orders to another Federal Home Loan Bank, but where several millions of these assets find their way into the registry of the District Court through interpleader, etc., does the court have power to award from these assets interim fees to the attorneys of the seized bank and to the attor-

ney of a member institution which has brought a class action to test the propriety of the seizure?

8. Petitioners hereby adopt by reference all further points, questions and arguments made by other petitioners.

Reasons Relied on for Allowance of Writ.

(1) The opinions of the Court of Appeals pass upon important questions of federal, administrative and constitutional law which have not been, but should be, settled by this Honorable Court.

The opinions themselves recognize the difficulty, importance and novelty of the questions (see 196 F. 2d at 391, and footnote 2 in Op., Appeal 12591, pp. 4-5).

The decisions vitally affect the safety and stability of the entire Federal Home Loan Bank and Savings and Loan system throughout the United States. There are approximately twelve million depositors in, or borrowers from, more than one thousand five hundred Federal Savings and Loan Associations, with approximately ten billion dollars of savings and loans on homes. To this number must be added many state savings and loan associations who are members of Federal Home Loan Banks. All in all, nearly 4,000 savings institutions are stockholders in and dependent on Federal Home Loan Banks. The Federal Home Loan Banks have aggregate assets representing savings, deposits and loans on homes in excess of one billion dollars. It is a question of utmost consequence whether these Federal Home Loan Banks exist only at the

pleasure of respondent Home Loan Bank Boards so that they may be abolished, liquidated, merged or consolidated by delegated administrative legislation without hearing, and whether the act of the board in liquidating, merging, abolishing, consolidating or redistricting Federal Home Loan Banks, if legislative in nature, present a non-justiciable controversy which prevents the courts from reviewing the action of the administrative, even though that action is motivated by malice, arbitrary wilfulness and fraud.

(2) The opinions of the Court of Appeals are in conflict with the decision of this Honorable Court in *Fahey v. Mallonee* (91 L. Ed. 2030), which leaves the issues of wilfulness and malice on the part of the administrative agency open for judicial determination.

(3) The opinions of the Court of Appeals show on their face that they have departed from the accepted and usual course of judicial proceedings, and have not restricted themselves to passing on the question of the propriety of the preliminary injunction and the allowance of attorneys' fees, but have summarily dismissed the Los Angeles action incident to these limited appeals.

(4) The questions presented are of importance not only to the Federal Home Loan Banks throughout the country, and the Federal Savings and Loan structure of the entire nation, tremendous as its scope is, but because of similarity in structure apply by analogy to the Federal Reserve System and beyond that are of general importance in the development of administrative law.

This is especially true of the questions which raise the claim of unconstitutional use of constitutional powers.

Our government will not long remain one of law instead of men unless the courts retain effective power to curb arbitrary, wilful and malicious actions on the part of the administrative, be that action in the field of administrative adjudication or administrative legislation, even if, formally, the action taken may be within the scope of their delegated powers.

(5) It is important that this Honorable Court decide to what extent the District Court, in assuming jurisdiction to ascertain whether it has jurisdiction, has incidental powers to protect by receivership, injunction, by allowing attorneys' fees, or otherwise, assets of thousands of innocent third persons which have come into the court's possession prior to its inquiry into the merits of the questions before it.

WHEREFORE, YOUR PETITIONERS PRAY that a writ of certiorari issue under the seal of this court, directed to the Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Court of Appeals, had in the cases numbered and entitled on its docket Nos. 12511 and 12591 as follows:

Appeal No. 12511.

Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, *et al.*,

Appellants,

vs.

Mallonee, *et al.*, Shareholders Protective Committee of Long Beach Association, Long Beach Federal Savings and Loan Association, Title Service Company, *et al.*,

Appellees.

and

Appeal No. 12591.

Federal Home Loan Bank of San Francisco, *et al.*,

Appellants,

vs.

Federal Home Loan Bank of Los Angeles, *et al.*,

Appellees.

to the end that these causes may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgments herein of said Court of Appeals be reversed by the Court and for such further relief as to this Court may seem proper.

Dated: Los Angeles, February 4, 1953.

W. I. GILBERT, JR.,

Attorney for Wilmington Federal Savings and Loan Association and for W. I. Gilbert, Jr.

IN THE

Supreme Court of the United States

October Term, 1952

No. .....

WILMINGTON FEDERAL SAVINGS & LOAN ASSOCIATION, and W. I. GILBERT, JR., for themselves and on behalf of FEDERAL HOME LOAN BANK OF LOS ANGELES, and its stockholders,

Petitioners,

vs.

HOME LOAN BANK BOARD, WILLIAM K. DIVERS, O. K. LAROQUE, J. ALSTON ADAMS, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, JOHN H. FAHEY, A. V. AMMANN and GEORGE K. BRAMLEY,

Respondents and Appellants Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of Courts Below.

The opinion of the Court in the Appeal from the preliminary injunction (Appeal No. 12511) is reported in 196 F. 2d 336-391.

The opinion of the Court in the appeal from the order allowing interim attorneys' fees (Appeal No. 12591) has not yet appeared in the Federal Reporter as of the date hereof, but copies of the printed opinion of the Court of Appeals have been filed with the Court in connection with the various petitions herein.

Jurisdiction.

1. The dates of the opinions to be reviewed are

(a) As to Appeal 12511, April 2, 1952, rehearing denied December 13, 1952.

(b) As to Appeal 12591, November 6, 1952, rehearing denied December 17, 1952.

2. The statutory provision which is believed to sustain the jurisdiction of this court is 28 U. S. C. 1254(1).

3. The opinions reverse the following orders of the U. S. District Court.

(a) An order granting plaintiffs in the consolidated actions a preliminary injunction which enjoins interference with the jurisdiction of the District Court and which contains the provisions already summarized in the petition (Pet. pp. 8-9).

(b) An order granting interim attorneys' fees to the attorneys for Los Angeles Bank and Wilmington out of the monies in the Court's registry for representing the Los Angeles Bank or the stockholders in the suits testing the validity of the Los Angeles Bank's seizure.

The opinion in Appeal 12591, moreover, orders summarily the dismissal of the Los Angeles action.

When such orders and judgments of a United States District Court and of a United States Court of Appeals are involved, this Honorable Court can grant certiorari.

Statutes Involved.

The pertinent provisions of the statutes involved on this appeal are set out in a printed appendix filed on behalf of all petitioners. The statutes are:

Home Owners Loan Act, 12 U. S. C. 1421 to 1468. (App. p. 10.)

Federal Home Loan Bank Act, 12 U. S. C. 1421 to 1449. (App. pp. 4, 8, 9.)

Administrative Procedure Act, 5 U. S. C. 1001 to 1010. (App. p. 1.)

The Federal Interpleader Act, 28 U. S. C. 1335, 1397 and 2361.

Judicial Code, Paragraph 57, 28 U. S. C. 118 (now 1655). (App. pp. 14, 17.)

The administrative orders involved are, to-wit:

Order Nos. 5082, 5083, 5084, 5254, 388 and 2015. They are likewise set out in the common appendix.

Statement of the Case.

A statement of the matter involved has already been made in the preceding petition, pages 2-10. This statement is hereby adopted and made a part of this brief.

Specification of Errors.

1. The Court of Appeals erred in holding that the Los Angeles action did not present justiciable issues and ordering the same dismissed.
2. The Court erred in reversing the District Court's preliminary injunction enjoining the threatened administrative hearing of the affairs of Long Beach Association, while the issues of fraud and wilfulness and unlawfulness in the seizure of the two institutions was still pending, together with numerous interpleader actions.
3. The Court erred in reversing the order of the District Court allowing fees to the attorneys for Los Angeles Bank and for the plaintiffs in the class action.
4. The Court erred in making the above orders and decisions while there remained unheard and undecided, appeals from the appointment of a receiver in the consolidated action to preserve $14,000,000.00 of interpleaded assets.

ARGUMENT.

I.

Are Federal Home Loan Banks Institutions Which Exist at the Whim and Pleasure of Respondents, and Do the Stockholders of Such Banks Have Any Proprietary or Justiciable Rights as Stockholders of These Institutions?

(a) May Federal Home Loan Banks Be Dissolved and Liquidated Instantly at the Whim and Pleasure of Respondents?

The opinion of the Court of Appeals answers the question of this subheading with an unqualified "yes" by suggesting (Opinion in Appeal 12591, pp. 36, 37) that respondents derive their power over these banks by delegation from Congress and that, since Congress itself could have dissolved the Los Angeles Bank "on any consideration" without notice or hearing, respondents can do the same.

The analogy is obviously false.

(1) Congress may delegate legislative power under appropriate safeguards, but it cannot abdicate its power completely. It is not free to abandon its complete function to an administrative legislator.

(2) Congress could not have acted to repeal the charter of the Los Angeles Bank without prior publicity, and it would not have proceeded to legislate without Congressional hearings. Opportunity would thus have been afforded for protest and for voicing dissenting views, and those adversely affected by the proposed legislation could have been heard. Congress does not legislate, and has never legislated, in secrecy.

(3) If the Los Angeles Bank had been dissolved by Congressional action, the only matter left open for inquiry would have been whether the action of Congress was constitutional. When, however, an administrative legislator issues orders, rules or regulations, the question can always be raised whether he has overstepped the delegated power and whether, in legislating administratively, he has followed the mode of procedure prescribed under the act of Congress from which he derives his power. The Federal Home Loan Bank Act puts several restrictions on the administrator. One is that he can only reorganize on the basis of findings (12 U. S. C. 1446), and another restriction is that his redistricting must have due regard for the convenience of the people affected (12 U. S. C. 1423). These matters are taken up in Point IV of this brief.

(b) Do Stockholders of Federal Home Loan Banks Have Proprietary or Justiciable Rights as Stockholders of Such Institutions?

The opinion of the Court of Appeals (Opinion in Appeal No. 12591, p. 75) virtually denies that member associations of Federal Home Loan Banks have any proprietary or justiciable interest in the bank of which they are stockholders. This conclusion is borne out neither by logic nor by the record. The record shows that the Los Angeles Bank at the time of its seizure had a surplus of $32.00 per share [R. 9582]. Had the bank been lawfully and regularly liquidated at that time (not considering for the moment the costs of liquidation, the return to each member on liquidation would have been $132.00 per share of stock owned.

The members of the liquidated bank could have become, and in the case of Federal Savings and Loan Associations it would have been compulsory that they become, members of a new Federal Home Loan Bank (12 U. S. C. 1464(f)). Under the provisions of the act, they could have subscribed to the stock of the new bank at a price of $100.00 per share (12 U. S. C. 1426(b)), so that their liquidation dividend of $132.00 per share would have enabled each member of the liquidated bank to obtain 1.32 shares in the new organization. This would have enabled each member to exercise greater voting rights on all questions at all stockholders' meetings, excepting only the vote with respect to the Board of Directors where each member has only one vote regardless of the amount of stock it holds.

These valuable money and property rights were destroyed by the seizure of the Los Angeles Bank without adjustment of any kind.

As to the federally chartered institutions, the opinion seeks to justify this obvious taking of property by pointing out that they must be stockholders of a federal home loan bank (12 U. S. C. 1464(f)), and that even upon a rightful dissolution of one federal home loan bank, they must join another if they wish to continue in existence. While this might be a reason, as to them alone, for transferring their property from one federal home loan bank to another, it is no reason for cutting down their property rights from $132.00 to $100.00 per share in the process.

But what of the State-chartered building and loan associations who may, but need not, belong to a federal home loan bank? (12 U. S. C. 1424.) Their stock in the instant case was also transferred without adjustment. The liquidation would have given them $132.00 per share. It is true they can withdraw from the newly constituted bank at any time, but the newly created San Francisco Bank does not have a comparable surplus, and if they now withdraw, they will end up with $100.00 per share instead of $132.00 per share.

We submit, a plainer case of proprietary and justiciable rights cannot be imagined.

II.

The District Court Had Jurisdiction Over the Subject Matter of the Los Angeles and Mallonee Actions, There Being Allegations That They Involve Constitutional and Federal Questions.

The *Los Angeles* action, the *Mallonee* action, and the Third Party Complaint of the Long Beach Association specifically state that they arise under the Fifth Amendment [R. 2, 17, 286, 574, 9466, 9485].

Claims of unconstitutionality having thus been made, jurisdiction over the subject matter existed in the District Court regardless of its eventual decision on the constitutional issues. Jurisdiction in such cases is fundamental and is ordained by the Constitution itself.

United States Constitution, Art. III, Sec. 2.

Many cases establish this principle, as for instance:

R. R. Comm. of Calif. v. Pacific Gas & Electric Co., 302 U. S. 388, 82 L. Ed. 319:

"Because of the Federal question raised by the bill of complaint, the District Court had jurisdiction to determine all the questions in the case, local as well as Federal. * * * (Citing authorities.) * * *."

Sterling v. Constantin, 287 U. S. 387, 77 L. Ed. 375.

Similarly, both actions allege that they involve the application of one or more of the following Acts of Congress:

Home Owners' Loan Act of 1933, 12 U. S. C. 1461-1468;

Federal Home Loan Bank Act, 12 U. S. C. 1421-1499;

Section 57 of the Judicial Code (28 U. S. C. 118, now 1655).

While it has been decided in the *Mallonee* action that Section 5(d) of the Home Owners' Loan Act does not violate the United States Constitution and that there is no unconstitutional delegation of legislative power (see *Fahey v. Mallonee*, 332 U. S. 245, 91 L. Ed. 2030), the constitutionality of the acts of respondents in redistricting the Home Loan Bank Districts and seizing and dissolving the Los Angeles Bank have not been tested. Jurisdiction exists in the Federal District Courts to decide these issues.

III.

The District Courts Had Jurisdiction to Try the Issue That Ill-will and Malice Actuated the Supervising Authorities, That Is, That They Exercised Constitutional Powers in an Unconstitutional Way.

Both the *Los Angeles* and the *Mallonee* actions allege, in varying words, that the actions of the supervising authorities amounted to an unconstitutional use of the constitutional power, saying that they were unlawful, void, wholly punitive, arbitrary, and amounting to fraud in law. As this Honorable Court summarized the charges in the *Mallonee* action, they were "that ill will and malice actuated the supervising authorities." (332 U. S. at p. 2041, 91 L. Ed. at p. 257.) In the *Los Angeles* action these matters are not stated as conclusions, but are alleged extensively and in detail [R. 9480-9484].

(1) The mandate in *Fahey v. Mallonee* already quoted says that the District Court has power to try these issues.

> *Fahey v. Mallonee,* 91 L. Ed. 2030, at 2041, 332 U. S. at 257.

(2) Moreover, this Honorable Court has often indicated that courts have power to determine whether administrative action, although in apparent harmony with the authority conferred, was nevertheless an exercise of power either corrupt or in bad faith or so arbitrary and unreasonable as virtually to transcend the authority conferred.

> *Sterling v. Constantin,* 77 L. Ed. 375, 387, 287 U. S. 400-401;
>
> *Inland Steel Co. v. N.L.R.B.,* 109 F. 2d 9;
>
> *N.L.R.B. v. Phelps,* 136 F. 2d 562;

United States v. Morgan, 83 L. Ed. 1211, 307 U. S. 183;

Dismuke v. United States, 297 U. S. 167, 172, 80 L. Ed. 561, 56 S. Ct. 400;

42 Am. Jur., Public Adm. Law, 611-617.

(3) The determination whether the exercise of the authority is so unreasonable as to virtually transcend the authority conferred will be made in spite of the fact that the act under which the administrative authority was exercised is silent as to judicial review.

Fahey v. Mallonee, 332 U. S. 245, 91 L. Ed. 2030:

"The absence from the Statute of a provision for court review has sometimes been held not to foreclose review. Stark v. Wickard, 321 U. S. 288, 88 L. Ed. 733, 64 Supreme Court 559; Federal Reserve System v. Agnew, 329 U. S. 441, *ante,* 408, 67 Supreme Court 411; Administrative Procedure Act, 5 U. S. C. A. §1009, 2 FCA, title 5, §1009."

In *Federal Reserve System v. Agnew,* 329 U. S. 441, 91 L. Ed. 408, it was recognized that even though there is no review provision in this related Act, the action of the Board is subject to judicial review, whether or not there is a charge of fraud:

"The Board contends that the removal orders of the Board made under §30 are not subject to judicial review in the absence of a charge of fraud. It relies on the absence of an express right of review and on the nature of the federal bank supervisory scheme on which §30 is an integral part. *Cf.* Adams v. Nagle, 303 U. S. 532, 82 L. ed. 999, 58 S. Ct. 687; Switchmen's Union of N. A. v. National Mediation Bd., 320 U. S. 297, 88 L. ed. 61, 64 S. Ct. 95; Estep

> v. United States, 327 U. S. 114, 90 L. ed. 567, 66 S. Ct. 423. A majority of the Court, however, is of the opinion that the determination of the extent of the authority granted the Board to issue removal orders under §30 of the Act is subject to judicial review and that the District Court is authorized to enjoin the removal if the Board transcends its bounds and acts beyond the limits of its statutory grant of authority. See American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 S. Ct. 33; Philadelphia Co. v. Stimson, 223 U. S. 605, 620, 56 L. ed. 570, 576, 32 S. Ct. 340; Stark v. Wickard, 321 U. S. 288, 309, 310, 88 L. ed. 733, 747, 748, 64 S. Ct. 559."

The reason that the absence of review provisions does not militate against the right to judicial review is well stated in *Butterworth v. Boyd,* 12 Cal. 2d 140, 82 P. 2d 434, 126 A. L. R. 838, where the Court said on page 149:

> "Constitutional guarantees against arbitrary and discriminatory action are read into the law, and the Courts will compel administrative officials to respect them. (People v. Globe Grain & Milling Co., *supra;** Gaylord v. Pasadena, 175 Cal. 433 [166 Pac. 348].)"

(4) If it had been the intention of Congress to deny judicial review of questions arising under the Home Owners' Loan Act and the Federal Home Loan Bank Act, such a provision would be violating the Fifth Amendment. Even though the actions of the administrative are expressly clothed with administrative finality, such a provision "under our system" cannot circumscribe "the judicial power of a competent court" to inquire whether the

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*211 Cal. 121.

administrative action goes beyond the limits of constitutional authority.

St. Joseph's Stockyards Co. v. United States, 298 U. S. 38, 52, 80 L. Ed. 1033, 1041, 56 S. Ct. 720;

Estep v. United States of America, 327 U. S. 114, 90 L. Ed. 567;

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 95 L. Ed. 817;

Wong Yang Sung v. McGrath, 339 U. S. 33, 94 L. Ed. 616.

IV.

The District Court Had Jurisdiction to Inquire Whether Orders 5082-5084 Had the Effect of Transferring the Assets of the Los Angeles Bank to the San Francisco Bank.

(a) The Court Had Power to Review Under the Law as It Existed Before the Administrative Procedure Act.

Apart from the Administrative Procedure Act, the Court had jurisdiction to inquire what effect Orders Nos. 5082 and 5084 had upon the property of Wilmington and the Los Angeles Bank. The power to inquire into title to property and to remove clouds from titles is plain under the Court's equity power and also because a federal question is involved since, as we have pointed out, the validity of the orders depends on whether applicable federal statutes have been followed. In determining this disputed point and particularly whether the property in question belonged to the purportedly dissolved Los Angeles Bank or the Portland Bank or the San Francisco Bank, the Court had power to decide whether the orders accomplished what they set out to do.

In addition to the cases already given under Point II, see

Social Security Board v. Nierotko, 327 U. S. 358, 90 L. Ed. 718.

". . . Administrative determinations must have a basis in law and must be within the granted authority. . . . An agency may not finally decide the limits of its statutory power. That is a judicial function. . . ."

(b) The Administrative Orders in Question Are Reviewable Under the Administrative Procedure Act.

Under the Administrative Procedure Act, the District Court had jurisdiction to review Order 2015 against Long Beach Association decreeing a new administrative hearing. Under this act it could also pass upon the validity of Orders 5082-5084 purporting to dissolve the Los Angeles Bank and to transfer its assets.

5 U. S. C. 1001 *et seq.*

The long struggle preceding the adoption of the Act and its legislative history clearly indicates an intention on the part of Congress to provide not only effective remedies against what had been considered by many arbitrary administrative action, but also to provide new directions to the administrative process with adequate standards of fairness and review provisions giving assurance that administrative abuses and unlawful administrative actions could be submitted to the courts for full review.

Wong Yang Sung v. McGrath, 339 U. S. 33, 94 L. Ed. 616.

The claim that Orders 5082 to 5084 did not conform to the statutory provisions of the Federal Home Loan Bank

Act can be reviewed under the provisions of the Administrative Procedure Act, even though the orders were adopted before the passage of the Act.

Universal Camera Corp. v. N. L. R. B., 340 U. S. 474, 95 L. Ed. 456;

N. L. R. B. v. Pittsburgh Steamship Company, 340 U. S. 498, 95 L. Ed. 479:

> "The Government concedes, we think rightly, that the scope of the court's reviewing power was governed by the legislation in force at the time the power was exercised even though the Board's order antidated such legislation." (95 L. Ed. p. 481.)

(c) Particulars in Which Respondents, in Issuing Orders 8052-8054 Failed to Follow the Federal Home Loan Bank Act.

There are several particulars in which the pertinent sections of the Federal Home Loan Bank Act were violated in issuing Orders 8052-8054. The Act (par. 1446) provides:

> "Whenever the board finds that the efficient and economical accomplishment of the purposes of this chapter will be aided by such action, and in accordance with such rules, regulations, and orders as the board may prescribe, any Federal Home Loan Bank may be liquidated or reorganized, and its stock paid off and retired in whole or in part in connection therewith after paying or making provision for the payment of its liabilities. In the case of any such liquidation or reorganization, any other Federal Home Loan Bank may, with the approval of the board, acquire assets of any such liquidated or reorganized bank and assume liabilities thereof, in whole or in part."
>
> July 22, 1932, c. 522, §26, 47 Stat. 740.

(1) *"May Be Liquidated or Reorganized."*

The use of the disjunctive "or" in this clause will be noted.

As against this power to liquidate or reorganize, the Commissioner, by simultaneous action evidenced by Orders Nos. 5082, 5083 and 5084, purported to (a) liquidate *and* (b) reorganize *and* (c) dissolve the Los Angeles Bank *and* (d) transfer all of its assets, wholly without consideration, to the Portland-San Francisco Bank; and all of this without any action whatever by the directors or shareholders of either the Los Angeles or the Portland Bank [R. 9478-9479].

These activities were wholly without legal justification or excuse.

In the first place, this was not a liquidation. There was no pretense of paying off such creditors as the bank may have had or of winding up its affairs [R. 9477-9478]. A mere transfer of assets, with or without consideration, is not a liquidation.

Buck v. Kleiber Motor Co. (9 Cir.), 98 F. 2d 903.

In the second place, the transaction was not a reorganization. The Los Angeles Bank was not reorganized, for the aim of the three orders was only to encompass its complete destruction. And again, a mere transfer of assets, with or without a consideration, is not a "reorganization," and more than it is a "liquidation." Obviously it is either a sale (if there be a consideration), or, as was the case here, a *gift* (made in this case by one having no power of disposition).

Compare:

LeTulle v. Schofield, 308 U. S. 415;

Commissioner v. Kitselman (7 Cir.), 89 F. 2d 458, 460;

United Light & Power Co. v. Commissioner (7 Cir.), 105 F. 2d 866, 877;

National Surety Co. v. Sand Springs State Bank (Okla.), 177 Pac. 574, 576.

In the third place, as we have indicated above, the Commissioner had no power of disposition over the assets of the Los Angeles Bank, either by way of sale, gift or otherwise, to the exclusion of corporate action by the bank itself.

Under Section 12 of the Act (12 U. S. C., Sec. 1432), full corporate powers are vested in the home loan banks, subject only to the approval of the Commissioner (Board) in specified particulars not here material. *It was thus the bank, as a corporation, and not the Commissioner, which had the power to hold or dispose of its property.*

The necessary conclusion is that the Commissioner did not "liquidate," nor did he "reorganize." What he did was to give away, to another corporate entity, assets over which he had no power of disposition; and this he could not lawfully do under any provision of the Act.

(2) *"And Its Stock Paid Off and Retired in Whole or in Part in Connection Therewith."*

It is undisputed that none of the stock of the Los Angeles Bank was either paid off or retired. In lieu of this, Order No. 5082 attempted by *fiat* and without the knowledge or consent of any of the Los Angeles Bank stockholders to make the latter shareholders of the Port-

land-San Francisco Bank. Such action was wholly without warrant or authority in law besides amounting to a clear violation of the intent and purpose of Section 26.

(3) *"After Paying or Making Provision for the Payment of Its Liabilities."*

The liabilities of the Los Angeles Bank were not paid off nor was any valid provision made for their payment. Order No. 5082 purported to provide that the liabilities and obligations of the Los Angeles Bank "are to be" assumed by the Portland Bank; and the same "are hereby declared to be and become the liabilities and obligations of" the Portland Bank. The attempt of the Commissioner thus to force such liabilities and obligations on the Portland Bank was a clear encroachment upon the powers of that institution to enter into contracts as provided in Section 12 of the Act; all of which was to the prejudice of the creditors and members of the Los Angeles Bank.

(4) *"Any Other Federal Home Loan Bank May With the Approval of the Board Acquire Assets of Any Such Liquidated or Reorganized Bank."*

Here, again, it is undisputed that the Portland Bank did not "acquire"; the assets were forced upon it in derogation of its own corporate powers. There appears, to this day, no formal action of that Bank in this record which acquiesces in or accepts the action taken. An assumption of liabilities, of course, envisages a voluntary contractual arrangement for the benefit of creditors or others having an interest in the assets transferred. Here there was no contract whatever; and any creditor of the Los Angeles Bank prior to seizure would have been powerless to enforce his demands has the Portland Bank chosen to resist them.

In addition to the foregoing, the attempt to dissolve the Los Angeles Bank even aside from the other effects of the orders, necessarily operated as a deprivation of the property of the Los Angeles Bank and its members associations without due process of law.

Section 25 of the Act (12 U. S. C., Sec. 1445) provides that each Federal Home Loan Bank shall have succession until dissolved by the Board (Commissioner) "under this Chapter" or by further Act of Congress. Reference to Section 12 reveals that a dissolution operates to deprive the dissolved bank of the powers, among other, to make contracts and to own, hold and dispose of property. In this case, it is admitted by the Portland Bank that at the time of seizure Los Angeles Bank owned in its own right or was entitled to the possession of assets and properties owned by its member-shareholders of a total value in excess of $45,000,000.00. The effect of the "dissolution" was by administrative ukase and without notice, hearing or opportunity to be heard, to strip the Los Angeles Bank of all of these assets and place them in the possession of the Portland Bank. In the case of the member-shareholders of the Los Angeles Bank the effect was to strip them of their membership and shareholder status in the Los Angeles Bank, to thrust upon them, without their consent, membership in the Portland-San Francisco Bank and turn over their assets in the possession of the Los Angeles Bank either as collateral or on deposit to the Portland-San Francisco Bank. Such activities constituted a clear deprivation of property without due process of law both as to the Los Angeles Bank and its members.

Compare:

Scott v. Donohue, 93 Cal. App. 126, 129-130;

Knights, etc. Inc. v. Francis, 79 Cal. App. 383, 385-386.

"The historic phrase 'a government of laws and not of men' epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights he was not indulging in rhetorical flourish. He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic. 'A government of laws and not of men' was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power." (Mr. Justice Frankfurter, concurring in *United States v. United Mine Workers,* 330 U. S. 258, 307-308.)

(6) *"The Board May, After Hearing, Remove Any Member From Membership."*

The Act says:

"* * * and the Board may, *after hearing,* remove any member, from membership, * * * in any such case the indebtedness of such member * * * shall be liquidated. Upon the liquidation of such indebtedness such member * * * shall be entitled to the return of its collateral and upon surrender and cancellation of such capital stock the member shall receive a sum equal to its cash paid subscriptions for the capital stock surrendered * * *." (12 U. S. C. 1426(i).)

If Wilmington was to lose its right to be a stockholder, it could lose that right or its position in the corporation only after a hearing.

Admittedly, Wilmington was not heard.

(d) Although the Redistricting and Liquidating Action May Have Been Legislative, the Question Whether That Power Was Properly Exercised Was Not a Non-justiciable One.

The opinion of the Circuit Court of Appeals in the *Los Angeles* action indicates that the District Court was without jurisdiction to review Orders 8052-8054, because the redistricting of Federal Home Loan Bank District is a legislative function. It holds in effect that what districts shall exist or in what way they shall be regrouped is a matter in which neither the public nor the members of the various home loan banks have a justiciable interest and that, therefore, the court is powerless to inquire whether the redistricting was done for fraudulent, malicious, oppressive and capricious motives. In this, we submit, the position of the Court of Appeals is incorrect.

Subdivision (c) of this point shows clearly that the actions of the Board *were not entirely legislative*. If the redistricting parts of the orders were, the parts dissolving and liquidating the banks were not.

But even those parts which were legislative are subject to the safeguards of the Administrative Procedure Act.

5 U. S. C. 1003;

Estep v. United States of America, 327 U. S. 114, 90 Fed. 567.

Administrative legislation is subject to review as well as is administrative adjudication.

5 U. S. C. 1003.

Certain standards of fairness must be observed even in administrative legislation and their application is safeguarded by an opportunity for review.

In the *Los Angeles* action, the type of legislation which is involved is that of redistricting. It is one thing to say that if the power to redistrict is conferred upon an administrative agency, its decision cannot be upset by judicial review if the decision is arrived at in the exercise of discretion. It is an entirely different matter, however, to say that there can be no review if there are the strongest indications, not only from the allegations of the complaint, but from investigations of congressional committees, of whose reports this Honorable Court will take judicial notice that the redistricting power was in fact exercised unlawfully, for punitive purposes, arbitrary and as an abuse of discretion.

It is well-settled that if the exercise of administrative power, be it judicial or legislative, is so unreasonable as to virtually transcend the authority conferred, or is in violation of the fundamental rules of due process "or is tainted with malice which disclose fraud, mistake, bad faith, corruption, or collusion, or is based upon an error of law,"* our entire philosophy of Government requires that the courts take jurisdiction and correct the matter. And so, indeed, it has been held, with special reference to the redistricting of school and assessment districts, and in zoning ordinances. By analogy, the same considerations apply to what the Federal Home Loan Bank Board has attempted to do here by Orders Nos. 5082 to 5084.

In the matter of redistricting school districts and assessment districts, the courts have not hesitated to strike down arbitrary, capricious, malicious or punitive action by administrative authorities when exercised for purposes other than those for which the power was conferred.

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*42 Am. Jur., Public Administrative Law, 612-617.

Two A. L. R. annotations discuss this particular field. The first one, 65 A. L. R. 523, says at 1529:

> "It is very generally held that Administrative officers have a broad discretion as to the changing of boundaries of school districts, that their decision is final, and that no cause of action will arise against such officers for the manner in which their discretion is exercised, *unless their action is based upon an erroneous theory of law, or so arbitrary, fraudulent, or grossly unjust as to constitute an abuse of discretion justifying judicial interference.*" (Emphasis ours.)

The foregoing note is brought up to date in 135 A. L. R. 1096 (4):

> "As said in the original annotation, the wide discretion which Administrative officers vest in changing the boundaries of school districts must be exercised in good faith for the best interest of the people of districts affected, upon terms which are just and equitable, and which do not cause unnecessary hardship: and if exercised in such a fraudulent, arbitrary, or unreasonable manner as to constitute an abuse of discretion, the Courts will interfere in behalf of the district or voters injured thereby."

An Ohio Court in *Heaton v. Jackson* (1930), 34 Ohio App. 424, 171 N. E. 364, held that a County Board of Education had abused its discretion in transferring about 800 acres of land of one school to a joining school district and said:

> "We appreciate the fact that the power to arrange school district has been delegated by the Legislature, under authority of Paragraph 3, Article VI of the

> Constitution, to the County Boards of Education, and that wide latitude and discretion have been lodged in the County Board, but we do not recognize that there is no limit to the exercise in such matters of its nearly autocratic power."

The Supreme Court has held that, although administrative officers have discretion to district and to redistrict, a review of their action on constitutional principles is within the power of the courts and will be exercised when there was arbitrary action and a plain abuse in the exercise of the power.

In *Myles Salt Co. v. Bd. of Commissioners* (1916), 239 U. S. 478, 60 L. Ed. 392, it said:

> "The principle laid down by the courts, it was declared, is that the creation and determination of drainage districts being a legitimate and lawful exercise of discretionary powers, the courts are without power to impugn or inquire into motives 'where no fraud is pleaded.' * * *
>
> "Is this a correct view of the petition? The principle of law involved in the answer to the question is well known. There is no doubt that the legislature of a state may constitute drainage districts and define their boundaries, or may delegate such authority to local administrative bodies, and that their action cannot be assailed under the 14th Amendment unless it is palpably arbitrary and a plain abuse. Houck v. Little River Drainage Dist., decided November 29, 1915 [239 U. S. 254, *ante* 266, 36 Sup. Ct. Rep. 58]. Does the District under re-

view come within the principle or its limitation? Was it formed in an arbitrary manner and in plain abuse of power?"

The opinion then analyzes the petition and holds that it states a case of arbitrary exercise of power. It continues:

"But, * * * defendants contend that plaintiff missed its purpose and that a Federal question was neither presented to the courts below nor decided by them, and a motion is made to dismiss. It is said that 'under the law of Louisiana the action of the legislative body (the police jury), in the exercise of its discretion as to what property shall be included in a drainage district, will not be inquired into by the court, except upon a special averment of fraud, which is not pleaded.' And such decision, it is further contended, was a decision upon the state law, and presents no Federal question, the statute of the state not being attacked.

"We cannot concur in the contention. It is true the law of the state as written is not attacked, but the law as administered and justified by the supreme court of the state is attacked, and it is asserted to be a violation of the Constitution of the United States. The question presented is Federal and the Motion to dismiss is denied. And the considerations that move a denial of the motion move a decision of the merits of the question."

V.

The District Court Had Jurisdiction Over All Parties.

The opinion of the Court of Appeals holds that the members of the Home Loan Bank Board and the other respondents not residing in the State of California were not properly served and that, therefore, indispensable parties were lacking without whom the District Court did not have jurisdiction to proceed.

(a) The District Court Acquired Jurisdiction Over the Defendants in the Los Angeles Action Under 28 U. S. C., Sec. 118 (now Sec. 1655).

The Los Angeles action contains all the elements of a conventional cause of action in equity by an owner out of possession, to quiet title, to remove a cloud on title, and to regain possession. The complaint plainly sets forth ownership and right to possession in the Los Angeles Bank down to March 29, 1946, deprivation of that possession on March 29, 1946, by the three orders, 5082 to 5084, and this is followed up by allegations that the claim of the San Francisco Bank is wholly without right.

San Francisco Bank, under 12 U. S. C. 1432 is a corporation (just as is the Los Angeles Bank) which may sue and be sued. It had its residence in the State of California, and was, therefore, subject to the process of the District Court. Respondent Ammann, the conservator, was likewise personally served.

28 U. S. C. 1655, gives the court in equitable proceedings power to make an order directing absent defendants

to appear. Order of service was made [R. 9502, 595], respondents were served and a return of service by the U. S. Marshal is the record [9511].

Therefore, all of the defendants were properly before the court.

(b) The Filing of Order No. 388 in the District Court Constituted a General Appearance of Respondents.

After respondent Fahey was no longer a member of the board, Order No. 388 of the board was filed in the District Court [R. 8231]. It returned to Long Beach Association the previously seized assets. This Order says:

> "Be it further resolved that a certified copy of this resolution be forthwith delivered to the above named court and to counsel for each of the parties of record in actions Nos. 5254 P.H. and 5678 (WM) P. H. in said court except counsel for intervenors in said action."

The Los Angeles action is one of the two actions referred to in the quotation by number.

In furtherance of the purpose and intent of this order proceedings were had in the District Court [R. 10303 to 10334] in which the United States District Attorney for the Southern District of California appeared for defendant Fahey, *et al.*, and William F. McKenna, principal attorney for the Home Loan Bank Board, appeared as attorney for the defendant Home Loan Bank Board. In connection with this hearing both attorneys for respondents asked for relief as follows:

(a) That all acts of the conservator of Long Beach Federal be validated [R. 10332];

(b) That a special election for directors of Long Beach Federal be held under the supervision of the Court [R. 10314];

(c) That a bond be furnished by the officers of Long Beach Federal [R. 10333].

These demands and requests were made without reservation, and without a statement that the appearances were special, and if such a statement had been made it would have been of no avail because the things asked are inconsistent with a special appearance.

See:

Sterling Tire Company v. Sullivan, 279 Fed. 336;

Edgill v. Felder (5th Cir.), 84 Fed. 69;

Merchants, et al. v. Clow, 204 U. S. 288, 51 L. Ed. 488;

Texas & P. R. Co. v. Eastin, 214 U. S. 153, 53 L. Ed. 947;

Feldman v. Coon Ins. (10th Cir.), 78 F. 2d 838;

Alexander v. Hillman, 296 U. S. 222, 80 L. Ed. 192.

There is, then, no merit to the contention that respondents have not appeared generally.

(c) Even If Not All Parties Were Before the Court, the Record Was Ripe for Adjudication in Their Absence.

Assuming that the members of the Home Loan Bank Board were not properly served and did not generally appear, it does not follow that the court was without jurisdiction to proceed.

Youngstown, etc. v. Sawyer, 96 L. Ed. Adv. No. 16, pp. 8-9.

In this steel seizure case the President himself issued Executive Order No. 10340, attached as an appendix to the Supreme Court's opinion (pp. 826-828).

The owners of the seized property sued for declaratory relief and injunction, alleging the seizures to be fraudulent, unauthorized and unconstitutional.

The sole defendant was Sawyer, Secretary of Commerce. The President, who signed the seizure orders, was not a party. The Attorney General raised, in the District Court before Judge Pine, the indispensable party doctrine, unconsented suit against the United States, and similar matters.

Judge Pine, in his opinion (103 Fed. Supp. 569), said at page 576:

> ". . . There is no doubt, therefore, that the defendant is subject to an injunction, and the President not only is not a party but he is not an indispensable party to this action, as held in Williams v. Fanning, 332 U. S. 490. Hynes v. Grimes Packing Co., 337 U. S. 86. I find this point no bar to plaintiff's claim to relief."

The United States Supreme Court affirmed this holding, and said on page 824 of 96 L. Ed. Adv. No. 16:

> ". . . We agree with the District Court and can see no reason why that question was not ripe for determination on the record presented . . ."

(d) The District Court Also Had Jurisdiction Over All the Parties Respondent by Reason of Its Interpleader Jurisdiction.

In view of the numerous interpleader actions which were brought in the consolidated actions, the District Court had jurisdiction under the provisions of the Inter-

pleader Act, 28 U. S. C. A. 1335, 1397 and 2361. It further had enlarged interpleader jurisdiction under Rule 22 of the Rules of Federal Procedure, as well as generally under its Equity Powers.

Since this interpleader jurisdiction did exist, the District Court could, in furtherance thereof, issue its process nationwide.

28 U. S. C., Sec. 2361;

Treinies v. Sunshine Mining Co., 308 U. S. 64, 84 L. Ed. 85.

VI.

Since the District Court Had Jurisdiction, the Right to Issue an Injunction Existed Under Its Equity Powers in Cases Involving 28 U. S. C. 118 (Now 1655), Under the Provisions of the Administrative Procedure Act, and Under the Interpleader Act.

1. Where, as in this case, the district court is called upon to decide intricate and important jurisdictional questions on the outcome of which its ultimate right to give the relief asked for depends, it has the unquestioned power to restrain temporarily any acts on the part of the litigants which would interfere with existing conditions. This doctrine was announced in *United States v. United Mine Workers of America*, 91 L. Ed. 884, 910-911, 330 U. S. 258, 289-290, where we read:

> ". . . The government's complaint sought a declaratory judgment in respect to the right of the defendants to terminate the contract by unilateral action. What amounted to a strike call, effective at midnight on November 20, had been issued by the defendant Lewis as an 'official notice.' Pending a determination of defendants' right to take this ac-

tion, the Government requested a temporary restraining order and injunctive relief. The memorandum in support of the restraining order seriously urged the inapplicability of the Norris-LaGuardia Act to the facts of this case, and the power of the District Court to grant the ancillary relief depended in great part upon the resolution of this jurisdictional question. In these circumstances, the District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction."

2. Under its equity jurisdiction, the court not only had power over absent defendants, but also power to enjoin them from prosecuting or asserting claims in other tribunals involving the same property. It was so held in *Harvey v. Harvey* (C. C. A. 7, 1923), 290 Fed. 653. This was a case brought in United States District Court in Wisconsin against defendants, resident of Ohio, to adjudicate title to stock in a Wisconsin corporation. The certificates of stock were in the possession of one of the defendant corporations in Ohio and all defendants were residents of states other than Wisconsin. Appellants contend the action was *in personam* and could not be brought under 28 U. S. C. 118 (now 28 U. S. C. 1655). Appellants particularly objected to a preliminary injunction issued by the United States Court in Wisconsin restraining out of state defendants from voting or otherwise dealing with the stock certificates *in Ohio.*

The Court of Appeals affirmed the preliminary injunction and said, at page 659:

"Appellant's contention that the injunction granted relief *in personam* and therefore cannot be based

upon service under section 57 (Sec. 118, Title 28), which applies to action *in rem* is not well founded. This suit is in the nature of a suit to quiet title to personal property within jurisdiction of the court. The court has in its custody the *res.* It puts out its protecting hand and says to the defendants that the plaintiff claims the *res;* that pending the determination of that claim the *status quo* shall be maintained and the defendants restrained from using the *res;* that if they desire to contest the claim of the plaintiff to this property they shall come into court and do so . . .

". . . Consequently the court may determine the ownership, and, pending that determination, restrain all acts conflicting with the owner's muniments and incidents of ownership. Thus it may cancel contracts alleged to be fraudulent incumbrances upon plaintiff's title; *it may, in short, make any order that is necessary to secure to plaintiff the full enjoyment of his property within the court's jurisdiction, by injunction, or otherwise,* if within the prayer of the bill (citing cases).

"*These cases are appeals from the order granting a temporary injunction* and the order refusing to vacate or dissolve the same. *The merits of the controversy between the parties are not before the court, except in so far as necessary to determine* whether the plaintiff by his bill and affidavits has made out a case sufficient to sustain the temporary injunction . . ." (Emphasis added.)

3. Moreover, Section 9 of the Administrative Procedure Act (5 U. S. C. 1009) authorized the court to issue injunctions in order to afford relief pending its decision. Subsection d of Section 9 reads as follows:

> ". . . Upon such conditions as may be required and to the extent necessary to prevent the irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings."

4. The Court having acquired interpleader jurisdiction and physical possession of the interpleaded *res* has prior jurisdiction to dispose of all claims against it, and can enjoin all attempts to litigate concerning that *res* or to interfere with it, whether judicial or administrative.

> 28 U. S. C. A. 2361;
>
> *Dugas v. Amer. Surety Co.*, 300 U. S. 419, 81 L. Ed. 720.

The power to issue an injunction for the protection of the Court's interpleader jurisdiction exists likewise if the subsequent proceeding is before an administrative tribunal.

> *Dwinell-Wright Co. v. National Fruit Product Co., Inc.* (C. C. A. 1), 129 F. 2d 848.

In this case, plaintiff sued in United States District Court over the ownership of a trade mark. Defendant

answered, denying validity of the trade mark registration, claiming defendant owned the registration. After answer in the Federal Court, three proceedings were filed. Defendant filed petition in United States Patent Office for cancellation of plaintiff's trade mark registration. Plaintiff filed in the Patent Office a motion for stay of cancellation proceedings, and moved the District Court for injunctions to restrain defendant from prosecuting the cancellation proceedings in the Patent Office. Without following the proceedings in detail, here is what the Court said:

> "The District Court in its memorandum of decision gave its reasons for granting the plaintiff's motoin to restrain the defendant from prosecuting its proceeding for cancellation in the Patent Office as follows:
>
> " 'It has long been settled that a court of equity which has first taken jurisdiction of a case may, in order to prevent vexatious and harassing litigation, enjoin the parties from further proceedings in another forum. * * * There is no reason why this principle should not apply between two Federal Courts, or between a Federal Court and an administrative tribunal of the United States. . . .'
>
> "Clearly, it is just as harassing and vexatious, and there is just as much waste and duplication of effort involved in twice trying the same issue between the same parties whether the second trial is before an administrative tribunal or before a court."

VII.

The United States District Court Had Power to Award Interim Fees to the Attorneys for the Los Angeles Bank and for the Stockholders, Including Wilmington, Plaintiffs in the Class Action.

(1) The order granting interim attorneys' fees is supported by findings [Appeal 12591, R. 288-304]. Some of these findings, among others Finding No. 10, respondents failed to attack on their appeal. It is therefore conceded, among other things [Appeal 12591, R. 295, Finding No. 10]:

> "That there is evidence that certain defendants herein have by intimidation, sought to prevent and preclude plaintiffs herein and Associations of the class represented by them from obtaining the advice or services of counsel to protect the interests of said Association or to represent them in court. That said intimidation has been evidenced by apparent threats of seizure if such Associations spent or appropriated funds for legal expenses and attorney fees in connection with the investigation by the Sub-Committee of the United States Congress and that defendant John H. Fahey was advised of such resolution on or about March 18, 1946, and that thereafter, to wit, on or about March 29, 1946, said Los Angeles Bank was seized in the manner hereinbefore specified. That subsequent to the seizure of the Los Angeles Bank and prior to seizure of the Long Beach Federal Savings and Loan Association, spot checks of the various Associations were made at the instigation of certain defendants herein for the purpose of ascertaining whether or not other Associations were making appropriations for the same purposes. That said acts and conduct as herein described furnished and furnish reasonable ground for the plaintiffs in Action

5678-PH and the Associations represented by them to believe that if said Associations or any of the appropriated, or now appropriates, or uses their funds for purposes of defraying legal expenses or counsel fees that they might have been, or may likewise be, seized in the manner that the said Los Angeles Bank and Federal Savings and Loan Association of Long Beach were seized."

By their failure to make appropriate assignments of error, it is likewise admitted that the *Los Angeles* action was instituted in good faith and on reasonable grounds [Appeal 12591, R. 291, Finding No. 5].

Being fearful to use its own funds for the expenses of the litigation, recourse to the impounded funds in Court was not only proper, but imperative, if the rights of Wilmington and of the class it represents were to be determined. Moreover, as a stockholder and depositor in the Los Angeles Bank, it had an equitable part ownership of the assets of this Bank.

> 11 Fletcher Cyc. of Corps. (Rev. and Term Ed. 1932), p. 93 and cases cited in footnotes 8 and 9.

To deny the Los Angeles Bank and the stockholders funds under these circumstances with which to test the validity of the seizure amounts to a denial of counsel, and a denial of counsel, even in civil matters, is a denial of due process of law.

> *Roberts v. Anderson* (10 Cir.), 66 F. 2d 874;
>
> *Prudential Ins. Co. v. Small Claims Ct.*, 76 Cal. App. 2d 379, 173 P. 2d 38.

The right of counsel includes a fair opportunity to secure counsel of one's own choice.

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158.

Where one is deprived of all one's assets by seizure, there exists a right of recourse to the funds so seized for the purpose of paying attorneys to contest the validity of the seizure. Some examples are: Bankruptcy, guardianships, receiverships and divorce.

(2) The class plaintiffs, as well as Wilmington, were either still stockholders of the Los Angeles Bank, or, if the action of the respondents was valid, were stockholders of the newly created San Francisco Bank. In any event, they owned all the collateral they had on deposit in the bank and had a proprietary interest in its surplus and, proportionately, in the funds interpleaded in court, whether the Los Angeles Bank continued to exist or whether—against their will—they had become members of the San Francisco Bank. If the alleged wrongdoers were entitled to draw on this fund to demonstrate the validity of their action, the innocent bystanders who owned the fund should have access to it on equal terms.

(3) It is well settled that when corporations are put into receivership or threatened with liquidation, funds of that corporation may be used and allowed for the purpose of testing the validity of the receivership or the seizure. Likewise, where a common fund exists to which a number of persons are entitled, the costs and fees of litigation for its preservation and protection are properly allowed from such fund.

Sprague v. Ticonic Bank, 307 U. S. 161;

Trustees v. Grenough, 105 U. S. 527;

Monaghan v. Hill, 140 F. 2d 31;

Barnes v. Newcomb, 89 N. Y. 108;

Anderson v. Great Republic Life Ins. Co., 41 Cal. App. 2d 181;

Winslow v. Ferguson, 25 Cal. 2d 274.

(4) Since the corporation has a right to have attorneys' fese allowed for the purpose of resisting its seizure, as long as this is done in good faith and on reasonable grounds, the ultimate success or failure of the action is immaterial and for that reason interim attorneys' fees prior to the determination of the merits are likewise proper.

Eggert v. Pacific States Savings and Loan Co., 53 Cal. App. 2d 554.

Conclusion.

In conclusion, we respectfully submit that the questions stated in the Petition and discussed in the brief, bring before this Honorable Court matters of vital concern far beyond the individual fate of petitioners; that fundamental issues are involved affecting the entire saving public and the innumerable owners of homes throughout the country.

For their benefit and protection, and for the protection of the institutions which serve them, this Honorable Court is respectfully urged to grant certiorari to determine the questions discussed, particularly:

(a) Whether there is power in the judicial branch of the government to curb the exercise of such vast power as is alleged to exist here, when it is exercised for improper and unworthy motives;

(b) Whether Federal Home Loan Banks can be dissolved at the whim and pleasure of administrative officials;

(c) Whether a court to whom the vast and complicated issues are presented which are entailed in these consolidated actions, has power—again in the interest of innumerable individual and corporate third parties—to use injunctive process and a special receiver to prevent the upsetting of existing conditions and loss to large segments of the population until the issues before it can be decided.

For all the reasons advanced, we respectfully urge that this Honorable Court take over the decisions of the Court of Appeals, Ninth Circuit, in the consolidated actions for review.

Respectfully submitted,

W. I. GILBERT, JR.,

Attorney for Wilmington Federal Savings and Loan Association and Himself,

Petitioners.

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IN THE

Supreme Court of the United States

October Term, 1952

No. 593

HOME INVESTMENT CO.,

Petitioners,

vs.

JOHN H. FAHEY, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Respondents.

Homeowners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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SUBJECT INDEX

PAGE

Petition for Writ of Certiorari 1

Opinions below 3

Jurisdiction 3

Jurisdiction of the District Court 4

Questions presented 6

Statutes involved 6

Statement 7

Specifications of error 14

Reasons for granting certiorari 15

1. Questions of nationwide importance 15
2. Homeowners' titles clouded 16
3. Homeowners lose both homes and money paid in reliance on U. S. Supreme Court mandate 17
4. First interpretation of important statutes 18
5. Court of Appeals' opinions directly conflict with U. S. Supreme Court decisions on this same litigation 19
6. "Administrative remedies" misapplied 22

Conclusion 24

Brief in Support of Petition for Certiorari 25

Argument 26

I. Jurisdiction of the District Court in interpleader is nationwide 26

II. Unavailable and refused administrative hearings are no bar to interpleader by the homeowners 29

III. Final interpleader judgments quieting the homeowners' titles are res judicata 34

Conclusion 36

Appendix reference 39

TABLE OF AUTHORITIES CITED

CASES

American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231.. 35

Baldwin v. Iowa Traveling Men's etc., 283 U. S. 522, 75 L. Ed. 1244 35

Dugas v. American Surety, 300 U. S. 414, 81 L. Ed. 720.....27, 34

Fahey, et al. v. Mallonee, et al., 332 U. S. 245, 91 L. Ed. 2030.....3, 11, 16, 18, 19, 31

Fahey, Ex parte, 332 U. S. 258, 91 L. Ed. 2041.....3, 11, 16, 18, 19, 36

Far East Conference v. United States, 342 U. S. 570, 96 L. Ed. (Adv. Ops. No. 10), 390..... 32

General Amer. T. Car Corp. v. El Dorado, etc., 308 U. S. 422, 84 L. Ed. 361..... 32

Maryland Casualty Co. v. Glassell-Taylor, 156 F. 2d 519..... 28

Morgan v. United States, 298 U. S. 468, 80 L. Ed. 1288.....30, 31

Morgan v. United States, 304 U. S. 1, 82 L. Ed. 1129.....30, 31

Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 318 33

Stoll v. Gottlieb, 305 U. S. 165, 83 L. Ed. 104..... 35

Thompson v. Texas Mexican R. R. Co., 328 U. S. 134, 90 L. Ed. 1132 32

Treines, et al. v. Sunshine Mining Co., 308 U. S. 66, 84 L. Ed. 85 .....11, 28, 34

United States v. Interstate Commerce Comm., 337 U. S. 426, 93 L. Ed. 1451..... 33

United States v. Morgan, 307 U. S. 183, 83 L. Ed. 1211..... 30

United States v. Morgan, 313 U. S. 409, 85 L. Ed. 1429..... 30

STATUTES

Federal Home Loan Bank Act (47 Stats. 725).....7, 18

Home Owners' Loan Act of 1933 (48 Stats. 128).....6, 15, 18

National Housing Act (48 Stats. 1246).....7, 18

PAGE

Public Law No. 404, Chap. 324 (79th Cong., 2d Sess.) 6, 18
United States Code, Title 12, Sec. 1461 ..... 6, 15, 18
United States Code, Title 12, Sec. 1724 ..... 7, 18
United States Code, Title 28, Sec. 41(26) 5, 6, 11, 12, 18, 27
United States Code, Title 28, Sec. 118 5
United States Code, Title 28, Sec. 380(a) 3, 5
United States Code, Title 28, Sec. 1253 3
United States Code, Title 28, Sec. 1254 3
United States Code, Title 28, Sec. 1335 ..... 5, 6, 11, 12, 18
United States Code, Title 28, Sec. 1397 ..... 5, 6, 11, 12, 18
United States Code, Title 28, Sec. 1655 5
United States Code, Title 28, Sec. 2361 ..... 5, 6, 11, 12, 18, 27
United States Code, Title 50, App., Sec. 601 ..... 7, 18
United States Code Annotated, Title 5, Secs. 1001-1011 ..... 6, 18

IN THE

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No. .....

HOME INVESTMENT CO.,

Petitioners,

vs.

JOHN H. FAHEY, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Respondents.

Homeowners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice and to the Honorable Associate Justices of the Supreme Court of the United States:

Home Investment Company, as a representative of the class of approximately 8,000 homeowner borrowers from Long Beach Federal Savings and Loan Association, pray that writs of certiorari issue to review the orders and judgments entered April 2, 1952 (Rehearing Petitions denied November 13, 1952), in Appeal No. 12511 and

November 6, 1952 (Rehearing Petitions denied December 17, 1952), in Appeal No. 12591, in the United States Court of Appeals for the Ninth Circuit, entitled:

No. 12511:

HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Appellants,

vs.

MALLONEE, *et al.*, Shareholders' Protective Committee of LONG BEACH ASSOCIATION, HOME INVESTMENT COMPANY, *et al.*,

Appellees.

No. 12591:

FAHEY, *et al.*,

Appellants,

vs.

MALLONEE, *et al.*,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees.

and respectfully represent as follows:

Opinions Below.

The opinion in Appeal No. 12511 will be found in 196 F. 2d 336.

The preliminary injunction, with findings, made by the District Court, will be found in Volume XVIII, of printed record on Appeal No. 12511, pages 8187 to 8537, inclusive.

The opinion in Appeal No. 12591 has not yet been reported. It is filed herewith in slip opinion form.

For the convenience of the Supreme Court, petitioners have made their references to the pages of the Court of Appeals' opinions by referring to slip opinions in both appeals, reprints of which are filed with these certiorari petitions.

Jurisdiction.

Supreme Court jurisdiction arises:

1. Under Title 28, United States Code, Section 1254,

2. Under Title 28, United States Code, Section 1253, to enforce the mandate of the Honorable Supreme Court, which resulted from direct appeal in 1947 under Section 380(a) of Title 28, United States Code, as it existed in 1946.

Such 1946 appeal resulted in *Fahey, et al. v. Mallonee, et al.,* 332 U. S. 245, 91 L. Ed. 2030. Original proceedings in *Ex parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041, were heard and decided at the same time.

The 1947 mandate of the Supreme Court to the District Court [R. 2302-2304, Apl. 12511] was relied upon

by homeowner borrowers who obtained many final judgments quieting titles to their homes [R. 8288-8293, Apl. 12511]. (See Appx. pp. 41 to 47.) Such judgments are final from the expiration of the time of appeal therefrom, or from appeals previously taken and dismissed [R. 3976-3978, Apl. 12511].

In 1950, the Court of Appeals denied writs of prohibition, etc., against the District Court. (See Appx. pp. 47 to 48.)

But in 1952, the Court of Appeals, in two opinions of more than 100 pages each, holds the District Court "Wholly without jurisdiction of the subject matter," and orders dismissal of the District Court proceedings. Obviously, these rulings contradict and are in conflict with the 1947 Supreme Court mandate and decisions.

Jurisdiction of the District Court.

Original complaints by depositors' and stockholders' protective committees, suing for their respective classes (numbering many thousands), were filed in the District Court in 1946, attacking the seizures and Acts of Congress as unconstitutional.[1]

Original, independent cross-claims, counterclaims, and complaints in intervention were filed by or on behalf of

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[1]Appeal No. 12511, C. C. A.-9, Vol. I: R. 294-295, 330-331, 338, 349-350; Vol. II: R. 573-574, 583; Vol. VII: R. 3193-3194, 3207, 3251-3253, 3288, 3291, 3299, 3301-3303, 3308. 3320-3321; Vol. XX: R. 9470, 9476, 9484, 9491-9493.

persons whose homes, titles, debts and properties were imperiled by the seizures [R. 43-56, 86-100, 8288-8293, Apl. 12511]. (See Appx. pp. 41 to 47.)

The original complaints were ~~until~~ under Title 28, United States Code, Sections 118 (as it existed in 1946, now Sec. 1655), and under Section 380(a). More than 50 separate interpleader interventions by independent cross-claims, counterclaims or complaints in intervention occurred. Such interpleaders were based upon Title 28, United States Code, Section 41(26), as it existed in 1946 (1948 Title 28, Secs. 1335, 2361 and 1397).

By such interpleaders, millions of dollars in cash and government bonds, notes and deeds of trust, and the titles to the homes of approximately 8,000 borrowers, came into the custody and protection of the District Court [R. 8421-8518, Apl. 12511]. Approximately $14,000,000.00 of such property is yet in the Registry of the District Court in interpleader.

Jurisdiction and authority of the District Court over:

1. Such $14,000,000.00 of securities, notes and deeds of trust in the possession of the Clerk of the District Court for from five to seven years, and

2. Titles to the thousands of homes and real property within the territory and district of the District Court,

exercised by the District Court for the protection of the public interest and these homeowner petitioners, is the main issue of this petition.

Questions Presented.

1. Do homeowners, by borrowing from Federal Savings and Loan Associations, upon the titles to their homes, thereby forfeit the statutory right of United States Court interpleader, created by Congress to, among other things, clear and quiet such titles?

2. Can the Court of Appeals reverse and nullify a mandate of the Supreme Court and judgments of the District Court, four years final, based upon such mandate?

3. Can refusal and denial of administrative hearings by the respondent Home Loan Bank Board prevent petitioners homeowner borrowers from recourse to the United States Courts by interpleader (or otherwise) to clear and quiet the titles to their homes?

Statutes Involved.

A. The application of the interpleader statutes (1946 Title 28, U. S. C., Sec. 41(26); 1948 Title 28, U. S. C., Secs. 1335, 1397, and 2361), to Federal Home Loan Banks conservators appointed by Federal Home Loan Bank Administration and Federal Savings and Loan Insurance Corporation, as receiver;

B. The Administrative Procedure Act (U. S. C. A. Title 5, Secs. 1001 to 1011, incl.; Public Law 404, 79th Cong., Chap. 324, 2nd Sess.), application to Federal Home Loan Banks seizures, liquidations and mergers and also to Federal Savings and Loan Associations conservatorships;

C. The Federal Savings and Loan Associations creative sections of the Home Owners' Loan Act of 1933, 48 Statute 128, 12 United States Code, Section 1461 *et seq.;*

D. The Federal Home Loan Bank Act, 47 Statute 725, 50 United States Code, App. 601; and

E. The Federal Savings and Loan Insurance Corporation, creative sections of the National Housing Act, 48 Statute 1246, 12 United States Code, Section 1724 *et seq.* (See Appx. pp. 1 to 18.)

Statement.

These are proceedings by homeowner borrowers, by deposit in interpleader into the Registry of the United States District Court of the full amount of the loans due on their respective homes, to clear and quiet the titles to their homes from clouds, tangles, and encumbrances on such titles. (See Appx. pp. 41 to 47.)

The title clouds were caused and created by *ex parte* seizure of a Federal Savings and Loan Association, and by instantaneous *ex parte* liquidation, merger, and dissolution of a Federal Home Loan Bank, all without notice, hearing or trial [R. 10, 13, 15-16, 304, 8229, 9107-9191, Apl. 12511].

The seized assets amounted to over $70,000,000.00. Immediately after seizure, they were assigned, transferred and commingled by respondents [R. 8402-8404, Apl. 12511].

The seizures were by respondents:

1. Fahey, Federal Home Loan Banking Commissioner,

2. Ammann, conservator appointed by Fahey,

3. Federal Home Loan Bank of San Francisco, and

4. Respondents Home Loan Bank Board, *et al.*, are successors to Fahey.

Petitioners act for themselves and as representatives of the class of 8,000 homeowner borrowers from Long Beach Federal Savings and Loan Association. The homeowners had individually conveyed the titles to their respective homes to a trustee under deeds of trust, to secure the repayment of about $800,000.00, loaned to petitioners, and a total of approximately $12,000,000.00 loaned to the class of 8,000 such borrowers.

Each of the thousands of loans was evidenced by a separate note [R. 8421-8518, Apl. 12511] (see Appx. pp. 41 to 47). Each trust deed conveyed the title to a separate home. 174 such notes and trust deeds made up the $800,000.00 which constituted the first interpleader by petitioner Home Investment Company [R. 271-274, Apl. 12511].

All such notes and deeds of trust were physically in the premises of Long Beach Federal Savings and Loan Association, at Long Beach, California, on May 20, 1946, the date of the original seizure. All were payable at the offices of said Association. All of the homes are within the territory of the District Court. Monthly installments payments were due thereon, on stated days of the month.

When respondents physically seized possession of the Federal Savings Association they thereby obtained possession of the thousands of notes and deeds of trust. Shortly after such seizure they assigned and transferred most, or all, of the various notes and deeds of trust to respondent Federal Home Loan Bank of San Francisco [R. 296-297, 8287-8293, Apl. 12511].

The Bank was created by the seizure of the Federal Home Loan Bank of Los Angeles, on March 29, 1946. (See Appx. pp. 28 to 32.) Thereby, respondents obtained possession of $46,000,000.00 of cash, United States gov-

ernment bonds, bank accounts, notes, loans and assets from said Federal Home Loan Bank.

By various transactions, loans and assignments, the assets of the seized Los Angeles Bank and of the seized Long Beach Federal Savings and Loan Association were intermixed and commingled.[2]

As a result of such seizures, assignments and commingling of the seized assets, multiple conflicting claims of ownership of the $12,000,000.00 in notes and the payments due from the homeowner borrowers thereon, arose and were made.

There was diversity of citizenship between the conflicting claimants which included the Shareholders' Protestive Committee, Mallonee, *et al.*, citizens of California, respondents Ammann, the conservator, and Fahey the Banking Commissioner, citizens of the District of Columbia officially, and of Maryland and Massachusetts individually.

There was other diversity among the three Federal Home Loan Banks of Los Angeles, Portland and San Francisco, conflicting claimants.

Homeowner borrowers could decide such conflicting claims only at the peril of repeated payments of the same debt. Homeowner borrowers owed but a single debt, the amount of the loan on their respective homes. They could neither satisfy nor discharge this debt by payment to any one of the conflicting claimants to the exclusion of the

---

[2]For complete details as to these transactions and the accounting ordered by the district court in connection therewith, see certiorari petitions of Shareholders' Protective Committee and of Long Beach Federal Savings and Loan Association filed, or to be filed herein.

others [R. 8288-8293, Apl. 12511]. (See Appx. pp. 41 to 47.)

The conservator claimed the right to receive payments on notes, even after he had assigned and transferred such notes to the respondent Federal Home Loan Bank of San Francisco.

The Shareholders' Protective Committee, attacking the seizures as unconstitutional,[3] warned that payment to any of the claimants would not discharge the shareholders' claims.

A *lis pendens* describing the litigation and all of the loans and titles involved, was filed in the appropriate County Recorder's office.

The trustee, holder of the legal titles under the deeds of trust, was sued as a party defendant by the plaintiffs, Shareholders' Protective Committee [R. 153, Apl. 12511]. The defendant trustee interpled the legal titles into the District Court and asked court instructions as to reconveyances [R. 43-56, Apl. 12511].

The homeowner borrowers interpled into Court the total amount due on the loans of their homes and asked the District Court to direct reconveyances, and to quiet their titles to their homes [R. 8288-8293, Apl. 12511]. (See Appx. pp. 41 to 47.)

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[3]Appeal No. 12511, C. C. A.-9, Vol. I: R. 294-295, 330-331, 338, 349-350; Vol. II: R. 573-574, 583; Vol. VII: R. 3193-3194, 3207, 3251-3253, 3288, 3291, 3299, 3301-3303, 3308, 3320-3321; Vol. XX: R. 9470, 9476, 9484, 9491-9493.

The District Court issued its interpleader summons and process, which, by Act of Congress, ran throughout the United States, including the District of Columbia.[4]

Such process was served on the respondents in conformity with the order of the District Court. The District Court accepted the interpleaders and made its judgments, directing deposit with the Clerk of the Court of reconveyances by the trustee, and requests for reconveyances by the conflicting claimants.

The homeowner borrowers paid to the Clerk of the Court the full amount due on the loans on their homes. The Clerk delivered the reconveyances to the homeowner borrowers, and the Court made its judgments quieting their titles.

This procedure was repeated on more than 50 occasions during 1946, 1947 and 1948 [R. 8288-8293, Apl. 12511]. (See Appx. pp. 41 to 47.)

In 1947, the United States Supreme Court[5] refused to dismiss the intervention proceedings, prohibit further District Court action, or reverse the judgments quieting titles.

Thereafter, in 1947, several of the intervention-interpleader quiet title judgments were appealed to the Court

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[4]Statutory reference, 1946 Title 28, Section 41(26); 1948 Title 28, Section 1335, 1397 and 2361; see also *Treines, et al. v. Sunshine Mining Co.*, 308 U. S. 66, 84 L. Ed. 85.

[5]*Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030; *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041.

of Appeals [R. 3152, Apl. 12511]. In 1948, the appeals were dismissed [R. 3976-3978, Apl. 12511].

The judgments quieting the titles to the homeowner borrowers have been final for from four to six years. Notwithstanding, on appeals taken in 1949 and 1950, the Court of Appeals has ordered dismissal of all proceedings in the District Court, thereby vacating the final quiet title judgments and again exposing the titles of the homeowner borrowers to the clouds, tangles, and encumbrances expressly quieted and removed by the final judgments of the District Court.

The homeowner borrowers are in no way concerned with the claims or conflicts of the shareholder depositors, the seizing government officials, the liquidated or surviving Federal Home Loan Banks, nor the officers and directors of the seized Federal Savings and Loan Association.

The homeowner borrowers owed a single debt, to be paid but once. Because of the seizures, transfers and commingling of the seized assets, none of the claimants could give the homeowners a clear and marketable title, even on payment in full of their loan on their homes.

The aid of the interpleader and equity powers of the United States District Courts (expressly conferred by Congress under 1946 Title 28, U. S. C., Sec. 41(26), 1948 Title 28, Secs. 1335, 1397 and 2361, U. S. C. A.), was invoked by the homeowner borrowers. Final judgments thereon in interpleader, and quieting the home-

owners' titles were made by the District Court [R. 8288-8293, Apl. 12511]. (See Appx. pp. 41 to 47.)

These final judgments are swept aside in 1952 by the Court of Appeals' opinions on grounds, all of necessity *finally decided* years ago (in 1946-7-8) by the District Court in granting the interpleaders and quieting the titles of the homeowners.

These homeowners petition the United States Supreme Court for certiorari to protect the titles to their homes and the final judgments quieting such titles, made by the District Court four or more years before the appeals, now decided by the Court of Appeals.

The millions of dollars of money paid by (or on behalf of) the homeowners remains in the Registry of the District Court [R. 8268-8270, 8287-8293, 8399-8529, Apl. 12511].

The Court of Appeals' opinions make no provision for the return to the homeowners of their money upon the nullifying of the final judgments quieting the titles to their homes. By nullifying the quiet title judgments and keeping the homeowners' money, the Court of Appeals' opinions deprive the homeowners both of the titles to their homes *and* the money that they have paid in full, discharge and satisfaction of the loans on their homes.

In faith and reliance on the 1947 mandate of the Supreme Court, the homeowners paid their money to the Clerk of the District Court in exchange for a judgment quieting their titles. Four to six years later, by the

Court of Appeals' opinions, they lose both the titles to their homes and the money paid to the United States Court.

Specifications of Error.

The Court of Appeals erred in both Nos. 12511 and 12591 when it held:

1. That none of the homeowners interpleader interventions justified relief; notwithstanding final judgment based thereon from which no appeal was ever taken;

2. That the District Court did not have interpleader, or other, jurisdiction to quiet the homeowners' titles against out-of-state respondents' conflicting claims;

3. That actions must be dismissed, notwithstanding quiet title judgments therein, four years final from lack of appeal;

4. That interpleader injunctions from which no appeal was ever taken must be vacated to permit respondent San Francisco Bank to foreclose against homeowners whose titles were quieted by judgments four years final from lack of appeal; and

5. That the District Court was without power to protect the homeowners by deposit into Court of disputed mortgages, notes, titles and loan payments pending administrative hearings and judicial review thereof.

REASONS FOR GRANTING CERTIORARI.

1. Questions of Nationwide Importance.

The creation of federal savings and loan associations was authorized by Act of Congress (Home Owners' Loan Act of 1933, 48 Stat. 128, 12 U. S. C., 1461 *et seq.*) for, among other purposes, to:

> ". . . provide local mutual thrift institutions to provide for the financing of homes, . . ."

There are over 1,500 such associations, with almost $10,000,000,000.00 of assets, approximately 5,500,000 depositors, and more than 6,000,000 borrowers.

The matters decided in the 200 pages of Court of Appeals' opinions are of immediate nationwide importance to every customer, depositor, or borrower, of all 1,500 federal savings and loan associations throughout the United States, and all Federal Home Loan Banks.

The federal home loan banks have in excess of $1,091,000,000.00 of assets and 3,981 state and federal savings and loan associations, whose assets are almost $18,000,000,000.00 and are members of such Federal Home Loan Banks.

The questions decided by the Court of Appeals are of first impression (except for this litigation and the previous decisions of the Supreme Court therein).

The opinions of the Court of Appeals deny to all such homeowners all access to the United States Courts to quiet or clear the titles to the borrowers' homes, from clouds created by governmental seizures of Federal Sav-

ings and Loan Associations and Federal Home Loan Banks, holding the loans on the borrowers' homes.

8,000 such borrowers (with $14,000,000.00 of assets on deposit in the Registry of the District Court), are directly prejudiced, and their titles will be re-clouded by the decisions of the Court of Appeals.

The other 6,000,000 homeowner borrowers throughout the United States are threatened with similar perils if the Court of Appeals' opinions become final.

2. Homeowners' Titles Clouded.

The titles to the homes of the 8,000 borrowers were clouded and tangled by respondents' seizures of the Federal Savings Association and Federal Home Loan Bank followed by immediate assignments and conveyances of more than $12,000,000.00 of loans and deeds of trust upon the borrowers' homes.

The homeowners' titles thus tangled were cleared by final judgments in interpleader (and otherwise) of the District Court in 1946-1948 [R. 8288-8293, Apl. 12511]. (See Appx. pp. 41 to 47.)

On previous appeals, the United States Supreme Court, in *Ex parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041, and in *Fahey, et al. v. Mallonee, et al.,* 332 U. S. 245, 91 L. Ed. 2030, refused to dismiss the interpleaders and remanded the case to the District Court for further proceedings. Such proceedings were had, resulting in final judgments, permanently quieting and clearing the titles of all but a very few, of the homes of the 8,000 borrowers [R. 8288-8293, Apl. 12511]. (See Appx. pp. 41 to 47.)

In 1947, after the Supreme Court mandate [R. 2302-2304, Apl. 12511], further appeals from certain of these judgments were taken by respondents to the Court of Appeals [R. 3152, Apl. 12511], and in 1948, such appeals were dismissed [R. 3976-3978, Apl. 12511]. Yet, in 1952, the Court of Appeals, four or more years after the judgments clearing the homeowners' titles became final, orders the proceedings dismissed, and the judgments vacated, because the District Court was at all times "without jurisdiction of the subject matter."

3. Homeowners Lose Both Homes and Money Paid in Reliance on United States Supreme Court Mandate.

Approximately $14,000,000.00 in money, government bonds, notes, deeds of trust, and other assets, were deposited in interpleader in the Registry of the District Court by, or on behalf of, homeowners [R. 8288-8293, Apl. 12511]. (See Appx. pp. 41 to 47.) Upon such interpleaders, the District Court made its final judgments quieting the homeowners' titles.

The Court of Appeals' opinions vacate and sweep aside such final judgments. Although expressly petitioned by the homeowners so to do, the Court of Appeals makes no provision for return to the homeowners of their money, paid to the District Court in exchange for clear titles to their homes.

Thereby, the Court of Appeals deprives the homeowners both of the titles to their homes and the millions of dollars paid by the homeowners to the District Court, in reliance upon the mandate of the United States Supreme Court, and upon judgments of the District Court based thereon which have become final.

4. First Interpretation of Important Statutes.

The 200 pages of opinions of the Court of Appeals are (with exception of the 1947 decisions of the United States Supreme Court with which such Court of Appeals' opinions conflict)[6] the first United States appellate court interpretation of major sections of Congressional Acts creating the Federal Home Loan Bank System and the Federal Savings and Loan System, throughout the United States. (See Appx. pp. 1 to 18.) Such legislation is:

A. The application of the interpleader statutes (1946 Title 28, U. S. C., Sec. 41(26), 1948 Title 28, U. S. C., Secs. 1335, 1397 and 2361) to Federal Home Loan Banks, conservators appointed by Federal Home Loan Bank Administration and Federal Savings and Loan Insurance Corporation, as receiver.

B. The Administrative Procedure Act (U. S. C. A. Title 5, Secs. 1001 to 1011, incl., Public Law 404, 79th Congress, Chap. 324, Second Session), application to Federal Home Loan Banks seizures, liquidations and mergers and also to Federal Savings and Loan Associations conservatorships.

C. The Federal Savings and Loan Associations creative sections of the Home Owners' Loan Act of 1933, 48 Stat. 128, 12 U. S. C., 1461 *et seq.*

D. The Federal Home Loan Bank Act, 47 Stat. 725, 50 U. S. C., App. 601.

E. The Federal Savings and Loan Insurance Corporation, creative sections of the National Housing Act, 48 Stat. 1246, 12 U. S. C., 1724 *et seq.*

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[6]*Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041, and *Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030.

Statutes of such immediate impact on the billions of dollars, savings of millions of savings depositors and homeowner borrowers throughout the United States should receive final authoritative interpretation and decisions by this United States Supreme Court.

This was recognized in the concurring opinion of Justice Stephens in Appeal No. 12511, wherein he said at page 391 of 196 F. 2d:

> ". . . The whole subject matter from the beginning presented highly difficult legal questions, solvable in certainty only by the court with the last say. I thoroughly agree that Fahey v. Mallonee, 1947, 332 U. S. 245, must be followed as indicated in the main opinion."

5. Court of Appeals' Opinions Directly Conflict With United States Supreme Court Decisions of This Same Litigation.[7]

In the 1947 decisions of this same litigation, the Supreme Court in *Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030, had before it the record on that appeal, which contained, among other things,

(a) The complaint in intervention of this petitioner on behalf of several hundred homeowners [R. 260-279, Apl. 12511], seeking to interplead approximately $800,000.00 into the Registry of the District Court to quiet the titles to 174 homes.

(b) The judgment of the District Court accepting said $800,000.00 deposit, and quieting such titles [R. 523-533, Apl. 12511].

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[7]*Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041, and *Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030.

Respondents (then appellants) in their 1947 brief to the United States Supreme Court, made the following statements (on p. 28, Subd. (A)):

> "A. JUDICIAL RELIEF IS NOT AVAILABLE UNTIL APPELLEES HAVE EXHAUSTED THEIR ADMINISTRATIVE REMEDY.
>
> "The complaint of appellee-shareholders and of the appellee-Association should have been dismissed as premature because these appellees have not exhausted their administrative remedies.[15] . . ."
>
> (Footnote):
>
> "[15]Dismissal of these complaints would necessarily lead to dismissal of the interpleaded cross-claims which rest upon the main claims."

Again on page 31:

> "Appellees' complaint should, therefore, have been dismissed under the 'long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' [Citing authorities] . . ."

The Supreme Court, however, considered the pleadings then before it and commented upon them, at page 247 of 332 U. S.:

> "Plaintiffs at once commenced this class action . . . The complaint alleged that the Conservator and the Chairman had seized the property without due process of law, motivated by malice and ill will, and that the seizure for various reasons was in violation of the Constitution. It asked return of the Association to its former management, permanent injunction against further interference, and other

relief. OTHER PARTIES IN INTEREST INTERVENED . . . (Emphasis added.)

". . . Ammann moved to dismiss the complaint on the ground that it failed to state a cause of action . . ."

On page 257 of the U. S., the Supreme Court said:

"Nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies.

". . . One of the allegations of the complaint is that it was intended that this institution would be merged with other institutions to the injury of its shareholders . . .

". . . It is obvious that there is more to this litigation than meets the eye on the pleadings. The plaintiffs' charges that ill will and malice actuated the supervising authorities, as well as the charges of the defendants that the institution has been mismanaged and that the management is unfit, are alike undetermined by the courts below, . . ."

The case was remanded by the Supreme Court to the District Court [R. 2302-2304, Apl. 12511]. The opinion closed with the words:

". . . without prejudice to any other administrative *or judicial proceedings* which may be warranted by law . . ." (Emphasis added.)

The Court of Appeals' opinions directly conflict with the former Supreme Court decisions by ordering dismissal of the entire actions and final judgments, thereafter rendered therein.

In reliance on the Supreme Court mandate, the original $800,000.00 interpleader was increased, by successive interpleaders by other homeowners or on their behalf, until approximately $14,000,000.00 of notes, government bonds, cash, trust deeds, and other assets are now on deposit in the registry of the Court [R. 8288-8293, Apl. 12511]. (See Appx. pp. 41 to 47.)

The interpleader protection of the homeowners thus approved by the Supreme Court in 1947, is, in the same litigation, repudiated by the Court of Appeals in 1952.

6. "Administrative Remedies" Misapplied.

The homeowner borrowers are denied all court relief because of "failure to exhaust" alleged "administrative remedies." Administrative hearings expressly demanded by certain of the depositors in 1948, were summarily refused by respondent Home Loan Bank Board (see Appx. pp. 19 to 21), because the issues were then pending before the District Court for decision. The homeowner borrowers were never authorized by statute, regulation, or otherwise, to apply for any administrative hearing.

The administrative hearing, if granted, could not quiet the titles to the borrowers' homes, clouded and tangled by the unconstitutional seizures.

Respondent Home Loan Bank Board is not a court and has no authority, statutory or otherwise, to quiet titles to real property, nor to decide the conflicting claims of ownership thereto.

The only administrative remedy available could be invoked SOLELY by petition of the officers and directors of the seized Federal Savings Association; officials, over whom the borrowers have no control whatsoever.

Yet, the Court of Appeals holds that if such officers refuse to petition, for administrative hearing, or if the Bank Board refuses to grant the hearing when sought, that the homeowner borrowers are completely helpless. Under such ruling the borrowers cannot apply to any court for relief until the non-existent administrative remedy is "exhausted" by OTHERS.

Thereby, the borrowers are compelled at their peril to decide which of several conflicting claimants shall be paid and which ignored.

Payment, even in full, to one claimant cannot release the undecided claims of the others. The borrowers are exposed to multiple and repeated successive payments in full of a debt they can only justly owe ONCE to one claimant.

No homeowner should be compelled to pay the entire mortgage on his home *in full* two or more times because there is a dispute as to who is owner of the mortgage. Nor should the homeowners be exposed to foreclosure and loss of their homes because they pay the losing claimant.

Only interpleader payment into the United States Courts can fully protect the homeowners. Yet, the Court of Appeals' opinion prevents all court relief to the homeowners thus threatened with foreclosure and loss of their homes.

Conclusion.

For the foregoing reasons, the Supreme Court should issue its writs of certiorari to the Court of Appeals for the Ninth Circuit and review and reverse the opinions and decisions of said Court of Appeals.

Respectfully submitted,

F. HENRY NECASEK,

Attorney for Petitioners Homeowners.

IN THE

Supreme Court of the United States

October Term, 1952

No. .....

HOME INVESTMENT CO.,

Petitioners,

vs.

JOHN H. FAHEY, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Respondents.

Homeowners' Brief in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petition which accompanies this brief is incorporated herein by reference. It contains:

(a) A statement of the grounds on which the jurisdiction of the Supreme Court is invoked, also the basis of jurisdiction of the District Court;

(b) A concise statement of facts;

(c) Citations of the opinions of the Court below;

(d) Questions presented;

(e) Specification of Errors; and

(f) Reasons for granting certiorari.

ARGUMENT.

POINT I.

Jurisdiction of the District Court in Interpleader Is Nationwide.

The Court of Appeals' opinions are based in part upon its holding that the District Court lacked PERSONAL jurisdiction over indispensable absent defendant Fahey, Banking Commissioner, and his successors Home Loan Bank Board.

Fahey and Home Loan Bank Board were personally served in Washington, D. C., by interpleader summons, injunction, and process of the District Court[8] [R. 80, 799, 81-82, 444-445, Apl. 12511] which by the express terms of the United States Statutes runs throughout the Nation, including the District of Columbia. Such service conferred plenary jurisdiction upon the District Court over the interpled titles to the borrowers' homes and notes, deeds of trust, and money, physically deposited in the registry of the District Court in the possession of its clerk.

United States Supreme Court decisions quoting the text of the interpleader statutes, and expressly confirming such nationwide interpleader jurisdiction, are:

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[8]Respondents' brief to the U. S. Supreme Court in 1946, states in part (p. 9): "On June 4, 1946, Title Service Company, trustee under numerous deeds of trust securing loans made by the Association, filed an . . . cross-claim in interpleader, . . ." (P. 10): "On June 12, 1946, one Robert H. Wallis filed another . . . cross-claim in interpleader . . ." (P. 11): "Service of process upon Fahey under both cross-claims in interpleader was made in the District of Columbia . . ."

Dugas v. American Surety, 300 U. S. 414, 81 L. Ed. 720—(1936). The Court said, at page 423 of the U. S., quoting the interpleader statute:[9]

> " 'Sec. 2. . . . Notwithstanding any provision of the Judicial Code to the contrary, said court shall have power to issue its process for all such claimants and to issue an order of injunction against each of them, . . . which process and order of injunction . . . shall be addressed to and served by the United States marshals for the respective districts wherein said claimants reside or may be found.'
>
> " 'Sec. 3. Said court shall hear and determine the cause and shall discharge the complainant from further liability; and shall make the injunction permanent and enter all such other orders and decrees as may be suitable and proper, and issue all such customary writs as may be necessary or convenient to carry out and enforce the same.' "

By judgment of the District Court ONE payment by the homeowners to the clerk of the District Court lifted ALL claims of all claimants from the homes, and transferred them to the funds in court [R. 8288-8293, Apl. 12511]. (See Appx. pp. 41 to 47.)

The Supreme Court, in the *Dugas* case, *supra*, said (at p. 425 of the U. S.):

> "In the interpleader suit there was an actual, complete and judicially sanctioned payment . . . While THE PAYMENT WAS INTO THE COURT'S REGISTRY, and not directly to the claimants, IT NEVERTHELESS WAS A LAWFUL AND EFFECTIVE PAYMENT

[9]1946 Title 28, Sec. 41(26), 1948 Title 28, Secs. 1335, 1397 and 2361.

under the Interpleader Act. In effect the first decree converted the claims under the bond into claims against the fund paid into the registry; . . ." (Emphasis added.)

In *Treinies v. Sunshine Mining Co.* (1940), 308 U. S. 66, 84 L. Ed. 85 (affirming Court of Appeals for 9th Circuit), the District Court in Idaho enjoined a receiver in the State of Washington.

The Supreme Court, in affirming the injunction, said at page 70 of the U. S.:

". . . Process may run at least throughout all the states."

Further, at page 74 of the U. S.:

". . . Such authority is essential to the protection of the interpleader jurisdiction and is a valid exercise of the judicial power."

In *Maryland Casualty Co. v. Glassell-Taylor* (C. C. A.-5, 1946), 156 F. 2d 519, the Court of Appeals said at page 523:

"The Federal Interpleader Statute and Rule 22, Federal Rules of Civil Procedure, were . . . designed to afford a means of process by which claimants to a fund, who live in other states, may be called in and required to litigate in one court to the end that all claimants to the fund, as well as the holder of the fund, may be given protection.

"We consider it important that the usefulness of the statutory remedy of interpleader, . . . should not be impaired by narrow and restrictive rulings. . . ."

POINT II.

Unavailable and Refused Administrative Hearings Are No Bar to Interpleader by the Homeowners.

The Court of Appeals opinion, at page 381 of 196 F. 2d, holds that failure to pursue administrative remedies "to their appropriate conclusion" requires dismissal of the homeowners' interpleaders and nullification of the final judgments in interpleader, quieting the homeowners' titles.

The applicable California statutes of limitations are four years. They have long since expired on the rights of the homeowners to pay the loans on their homes and clear and quiet their titles. If no court be open to the homeowners until the exhaustion by others of administrative remedies, unavailable to the homeowners, the meritorious right of the homeowner to pay off his loan in full is postponed and prevented by acts over which the homeowners have absolutely no control.

The homeowners can in no way compel either initiation, exhaustion, or completion of the administrative process.

(a) The homeowners cannot themselves apply to the Home Loan Bank Board for the administrative hearing as the Board's regulations expressly limit such application to the officers and directors of the seized Federal Savings Association.

(b) The homeowners cannot compel the officers and directors of the seized Federal Association to make such application for administrative hearing.

(c) Applications for such administrative hearing were made and the hearings enjoined by the district court at

the demand of the Shareholders' Protective Committee [R. 743-758, Apl. 12511].

(d) After reversal of the injunction, certain of the shareholder depositors did expressly demand administrative hearings. Their demand was refused and denied by respondent Home Loan Bank Board. (See Appx. pp. 19 to 21.)

Nevertheless, the Court of Appeals holds that none of the homeowners can obtain any relief from the court until "exhaustion of administrative remedies," unavailable to the homeowners, in any event.

During the almost seven years that administrative hearings were refused, enjoined, indefinitely postponed, and otherwise unavailable, the homeowners would long since have lost the titles to their homes and all of their payments and equities therein, due to lapse and expiration of the California four-year statute of limitations.

The "Morgan Cases," four times appealed to the United States Supreme Court in *Morgan v. United States* (1936), 298 U. S. 468, 80 L. Ed. 1288; *Morgan v. United States* (1938), 304 U. S. 1, 82 L. Ed. 1129; *United States v. Morgan* (1939), 307 U. S. 183, 83 L. Ed. 1211; and *United States v. Morgan* (1941), 313 U. S. 409, 85 L. Ed. 1429, exemplify the disastrous consequences to the homeowners of the doctrines in the Court of Appeals' opinions.

The *Morgan* cases litigation covered a period of more than seven years. In them, as in this *Mallonee-Fahey*

case, the District Court accepted jurisdiction by deposit into the court of disputed payments of money.

In the third *Morgan* case, *United States v. Morgan* (1939), 307 U. S. 183, 83 L. Ed. 1211, the Supreme Court upheld deposit of disputed payments into the registry of the District Court, and ordered the fund retained, pending final administrative orders and court review thereof. The Supreme Court said at page 191 of the U. S.:

> ". . . in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other . . . neither can rightly be regarded by the other as an alien intruder, . . ."

Further at page 198 of the U. S.:

> ". . . We think justice equally requires the court to await the outcome of the proceedings in order that it may discharge THE DUTY WHICH IT OWES TO THE LITIGANTS AND THE PUBLIC by avoiding unlawful disposition of the fund in the meantime, and ultimately distributing it to those found to be entitled to it (citing authorities)." (Emphasis added.)

The power of a United States District Court to accept jurisdiction and protect the rights of "the litigants and

the public" has been approved in the United States Supreme Court cases of:

> *Far East Conference v. United States,* 342 U. S. 570, 96 L. Ed. Adv. No. 10, p. 390, decided March 10, 1952.

The Supreme Court held, at page 395 of the U. S., that although the administrative remedy before the Federal Maritime Board had not been exhausted,

> ". . . we may either order the case retained on the District Court docket pending the Board's action . . . or order dismissal . . ."

Another Supreme Court case was:

> *Thompson v. Texas Mexican R. R. Co.* (1946), 328 U. S. 134, 90 L. Ed. 1132,

in which the judgments of the courts below were reversed and the cases remanded to:

> ". . . be held pending the conclusion of appropriate administrative proceedings." (P. 151 of U. S.)

Another case was:

> *General Amer. T. Car Corp. v. El Dorado, Etc.* (1940), 308 U. S. 422, 84 L. Ed. 361.

In reversing an order of dismissal by the courts below for failure to exhaust administrative remedies, the Supreme Court ordered the case retained by the District Court and said, at page 433 of the U. S.:

> ". . . There should not be a dismissal, . . . the cause should be held pending the conclusion of an appropriate administrative proceeding . . ."

Another similar case was:

Order of Railway Conductors v. Pitney (1946), 326 U. S. 561, 90 L. Ed. 318.

A dismissal for failure to exhaust administrative remedies as ordered by the District Court was reversed. The Court said, at page 568 of the U. S.:

". . . The dismissal of the cause should therefore be stayed by the District Court, so as to give an opportunity for application to the Adjustment Board . . . Any rights . . . might then, . . . be protected in this proceeding."

In *United States v. I. C. C.* (1949), 337 U. S. 426, 93 L. Ed. 1451,

will be found at page 464 of the U. S.:

". . . He may begin by filing his suit in court and ask the court to hold the case until he has obtained an administrative determination . . . there is jurisdiction to hold the case . . ."

POINT III.

Final Interpleader Judgments Quieting the Homeowners' Titles Are Res Judicata.

Judgments of a District Court on the question of jurisdiction, whether of the parties or the subject matter, which become final, cannot be thereafter nullified either in the same or other court proceedings.

The homeowners paid their debt into the registry of the District Court. Such payment is final and conclusive.

> In *Dugas v. American Surety* (1937), 300 U. S. 414, 81 L. Ed. 720,

the Court said at page 425 of the U. S.:

> "In the interpleader suit there was an actual, complete and judicially sanctioned payment . . . While the payment was into the court's registry, and not directly to the claimants, it nevertheless was a lawful and effective payment under the Interpleader Act . . .
>
> ". . . No appeal was taken from either decree. Therefore Dugas was bound by both decrees. . . . these rulings were . . . subject to challenge and re-examination ONLY ON APPEAL, and became conclusive on him in the absence of an appeal." (Emphasis added.)

> In *Treinies v. Sunshine Mining Co.* (1940), 308 U. S. 66, 84 L. Ed. 85 (affrming C. C. A.-9),

the Court said at page 78 of the U. S.:

> "One trial of an issue is enough. 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties." (Citing authorities.)

In *Stoll v. Gottlieb* (1938), 305 U. S. 165, 83 L. Ed. 104,

the Supreme Court said at page 172 of the U. S.:

". . . After a federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact . . ."

In *American Surety Co. v. Baldwin* (1932), 287 U. S. 156, 77 L. Ed. 231,

the Supreme Court said at page 165 of the U. S.:

". . . there was an actual adjudication . . . of the question of the jurisdiction of the trial court to enter judgment. . . . a final judgment constituting ***res judicata.***"

In *Baldwin v. Iowa Traveling Men's Etc.* (1931), 283 U. S. 522, 75 L. Ed. 1244,

the Supreme Court said at page 525 of the U. S.:

". . . after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.

"Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties . . ."

Respondents, in 1947, sought a writ of prohibition from this Honorable Supreme Court. The District Court, in its response to the rule to show cause, issued by the Su-

preme Court, stated that the District Court intended to, and would, make a finding:

> ". . . That the court has jurisdiction of the parties and subject matter involved."

In *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041, the Supreme Court denied the writ of prohibition. Thereafter, the District Court made said finding [R. 2354, Apl. 12511]. Respondents appealed in 1947 to the Court of Appeals and sought stay of the order of the District Court [R. 2440-2441, Apl. 12511]. The Court of Appeals denied the stay, and in 1948 the appeal was dismissed [R. 3550-3552, Apl. 12511].

The thousands of homeowners have relied upon the finality as *res judicata* of this conclusive ruling on the question of jurisdiction. Title insurance companies have insured the homeowners' titles as cleared and quieted, in reliance upon such final judgments made under the United States Supreme Court mandate [R. 8288-8293, Apl. 12511]. (See Appx. pp. 41 to 47.)

Five years later, in 1952, the Court of Appeals orders dismissal of the actions and holds the District Court was "wholly without jurisdiction of the subject matter."

Conclusion.

The 8,000 homeowners could not survive the 7 years of this litigation with the titles to their homes clouded and unmarketable, nor could the homeowners be expected to gamble the shelter of their families and children on the final outcome of:

(a) The 1946 decisions of the three-judge statutory court that the Home Owners' Loan Act was unconstitutional;

(b) The 1947 United States Supreme Court decisions that the statute was constitutional;

(c) The 1950 denial of writs of prohibition, etc., by the Court of Appeals;

(d) The 1952 decisions of the Court of Appeals ordering dismissal of the entire litigation, and reclouding the homeowners titles;

(e) The attempted foreclosure, in 1952, by respondent San Francisco Bank of the homeowners titles, cleared and quieted four (or more) years previously by final judgments of the District Court.

In 1952, respondent Federal Home Loan Bank of San Francisco, without any notice to the homeowners, sought from the District Court an order vacating the interpleader injunctions of 1948, so as to permit a new foreclosure action.

The District Court denied such application.

Respondent San Francisco Bank, again without any notice to the homeowners, applied to the Court of Appeals, which granted permission to file the foreclosure suit and vacated the final injunctions by the District Court, in no way involved in the pending appeals.

Respondent San Francisco Bank thereupon filed its foreclosure action in the State Courts. The action was removed and remains in the District Court pending the outcome of these certiorari proceedings.

Homeowners in 1952 petitioned the Court of Appeals on rehearing, for an order returning to the homeowners the millions of dollars they had paid, or caused to be deposited, in the District Court. Rehearing petitions were denied by the Court of Appeals without comment.

Certiorari review by the Supreme Court is all that stands between the 8,000 homeowners losing, by foreclosure, both the titles to their homes *and* the money they paid (or caused to be deposited), into the District Court, in reliance on the integrity of final judgments of the United States Courts.

Respectfully submitted,

F. HENRY NECASEK,

Attorney for Petitioners Homeowners.

Appendix Reference.

To prevent repetition in the several petitions for certiorari, a combined appendix by certain petitioners is filed herewith, bound as a separate volume. All appendix references in this petition are to such bound appendix.

6

Office - Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1952
No. 594

ERNEST R. UTLEY, as Receiver for FEDERAL HOME LOAN BANKS of Los Angeles, Portland, or San Francisco, whichever exists,

Petitioner,

vs.

JOHN H. FAHEY, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.,*

Respondents and Appellants Below.

Receiver's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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SUBJECT INDEX

PAGE

Receiver's petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit 1

Statement of matters involved 2

Findings and order appointing receiver 4

Appeal from appointment of receiver 6

Seizure of Los Angeles Bank and Long Beach Association 7

Actions of Ammann as conservator 7

Reaction of Los Angeles Bank and Long Beach Association to seizures 8

Consolidation of Los Angeles and Mallonee actions 9

Return of Long Beach Association to stockholders 9

Interpleaders and deposits in court's registry 10

Claimed causes of action resulting from Ammann's conservatorship 11

San Francisco Bank refuses to institute all claimed causes of action 12

Appointment of receiver 14

Settlement negotiations 15

Further proceedings in the consolidated action 15

Dismissal of Los Angeles action 16

Jurisdictional statement 17

(a) Jurisdiction of the Supreme Court 17

(b) Jurisdiction of the United States District Court 17

(c) Jurisdiction of the United States District Court appointing a receiver 17

Questions presented 18

Reasons relied on for allowance of writ 19

Results that will follow if receiver isn't allowed to sue 21

PAGE

Brief in support of petition for writ of certiorari. Opinions of courts below 23

Jurisdiction 23

Statutes involved 24

Statement of the case 25

Specification of errors 25

Argument 26

I.

The United States District Court had jurisdiction over the consolidated actions 26

II.

The United States District Court had jurisdiction to protect and decide upon the physical assets which had been interpled in its registry 26

III.

If a constitutional or federal question is properly stated, the complaint draws with it into the jurisdiction of the District Court all other matter raised in the complaint and the District Court has continuing power to dispose of all issues even though the federal or constitutional question are decided against the persons raising them 31

IV.

Holding statutes constitutional does not deprive court of jurisdiction 32

Conclusion 36

TABLE OF AUTHORITIES CITED.

CASES	PAGE
Bell v. Hood, 327 U. S. 678, 90 L. Ed. 939	33
Binderup v. Pathe Exchange, 263 U. S. 291, 68 L. Ed. 308	34
Federal Corp. Insurance v. Merrill, 92 L. Ed. 10, 332 U. S. 380	12
Gordon v. Ominsky, 294 U. S. 186, 79 L. Ed. 848	33
Land v. Dollar, 330 U. S. 731, 91 L. Ed. 1209	35
Mallonee v. Fahey, 91 L. Ed. 2030	9, 17, 32
Market St. Ry. v. Railroad Commission, 28 Cal. 2d 363, 171 P. 2d 875	27
Menasha Wooden Ware Co. v. Southern Oregon Co., 244 Fed. 83	29
Natural Gas, etc. v. Fed. Power Comm., 128 F. 2d 481	27
Pennsylvania v. Williams, 294 U. S. 176, 79 L. Ed. 841	33
Pennsylvania General Casualty v. Schnader, 294 U. S. 189, 79 L. Ed. 850	33
Railroad Commission of California v. Pacific G. & E. Co., 302 U. S. 388, 82 L. Ed. 319	31
Sterling v. Constantin, 287 U. S. 378, 77 L. Ed. 375	31
United States v. Morgan, 307 U. S. 183, 83 L. Ed. 1211	26
United States v. United Mine Workers, 918 L. Ed. 884, 330 U. S. 258	30
Vallelunga v. Gomes, 102 Cal. App. 2d 374, 227 P. 2d 550	28

STATUTES	
California Code of Civil Procedure, Sec. 572	29
Federal Home Loan Bank Act, Sec. 3	17
Federal Home Loan Bank Act, Sec. 12	17
Federal Home Loan Bank Act, Sec. 17	17
Federal Home Loan Bank Act, Sec. 25	17
Federal Home Loan Bank Act, Sec. 26	17

PAGE

Federal Home Loan Bank Board Administrative Order No. 388 ..... 9, 11, 25
Federal Home Loan Bank Board Administrative Order No. 2015 ..... 15, 25
Federal Home Loan Bank Board Administrative Orders Nos. 5082-5084 ..... 7, 8, 25
Federal Home Loan Bank Board Administrative Order No. 5254 25
Federal Rules of Civil Procedure, Rule 22 17
Federal Rules of Civil Procedure, Rule 64 29
Home Owners Loan Act, Sec. 5(d) 7, 9, 32
Judicial Code, Sec. 57 ..... 17, 24
United States Code, Title 5, Secs. 1001-1010 24
United States Code, Title 12, Secs. 1421-1449 ..... 17, 24
United States Code, Title 12, Secs. 1461-1468 ..... 7, 17, 24
United States Code, Title 28, Sec. 118 24
United States Code, Title 28, Sec. 1254 17
United States Code, Title 28, Sec. 1335 ..... 17, 24
United States Code, Title 28, Sec. 1347 ..... 17, 24
United States Code, Title 28, Sec. 1397 24
United States Code, Title 28, Sec. 1655 ..... 17, 24
United States Code, Title 28, Sec. 2361 ..... 17, 24
United States Code Annotated, Title 28, Sec. 1254(1) 24
United States Constitution, Fifth Amendment 17

IN THE

Supreme Court of the United States

October Term, 1952

No. .....

ERNEST R. UTLEY, as Receiver for FEDERAL HOME LOAN BANKS of Los Angeles, Portland, or San Francisco, whichever exists,

Petitioner,

vs.

JOHN H. FAHEY, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Respondents and Appellants Below.

Receiver's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Ernest R. Utley, as Receiver for Federal Home Loan Bank of Los Angeles, Portland and/or San Francisco, whichever exists, prays that writs of certiorari issue to review the orders and judgments entered November 13, 1952, in Appeal No. 12511, and December 19, 1952, in Appeal No. 12591, in the United States Court of Appeals for the Ninth Circuit, entitled:

Appeal No. 12511.

Home Loan Bank Board, *et al.*,

Appellants,

vs.

Mallonee, *et al.*,

Appellees,

and

Appeal No. 12591.

Federal Home Loan Bank of San Francisco, *et al.*,

Appellants,

vs.

Federal Home Loan Bank of Los Angeles, *et al.*,

Appellees.

Petitioner respectfully represents:

Statement of Matters Involved.

On March 15, 1952, an order was made in the United States District Court of Los Angeles in the consolidated actions Mallonee, *et al.*, v. Fahey, *et al.* [No. 5421 P.H.], and Federal Home Loan Bank of Los Angeles, *et al.* v. Federal Home Loan Bank of Portland, *et al.* [No. 5678 P.H.], appointing your Petitioner's predecessor receiver "for the limited purpose of preservation of property on deposit" in the District Court, "and of rights, claims and liabilities of the various parties thereto or thereon and for other purposes." (App.* p. 52 ff.)

Numerous individuals and corporations and the Federal Home Loan Bank Board as well as several officers, and

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*This reference, as well as all others marked "App.", is to the separate appendix filed for the benefit of all petitioners.

instrumentalities of the government are parties to these consolidated actions. The latter are the respondents herein. The suits arise in the first instance out of the seizure of the Federal Home Loan Bank of Los Angeles (hereinafter called the Los Angeles Bank) and the Long Beach Federal Savings and Loan Association (hereinafter called Long Beach Association) by respondents who placed respondent Ammann in charge of the affairs of Long Beach Association as its conservator. These consolidated actions brought in their train numerous very complicated questions, the complexity of which has grown with the years.*

One of the most vital of these questions is whether the Los Angeles Bank or the Federal Home Loan Bank of San Francisco or that of Portland exists.

It can be seen now that when this question is finally decided causes of action will vest in that Federal Home Loan Bank or those banks which will eventually be found to exist.

The temporary management of the affairs of Long Beach Association by a conservator has also given rise to causes of action on notes executed by him, and to others based on improvident and allegedly illegal activities of his.

The benefit of all these causes of action will inure to approximately three hundred federal savings and loan associations and many State Building and Loan Associations who are members of the Federal Home Loan Bank, and ultimately to many thousands of depositors who have deposited their savings with these institutions.

Due to the short statute of limitations prevailing in California, these causes of actions and claimed causes of

*The first of the consolidated actions was filed May 27, 1946.

action were in danger of becoming barred early in 1952. At this juncture of the case, Wilmington Federal Savings and Loan Association, one of the stockholder-plaintiffs in one of the consolidated actions petitioned to have a receiver appointed for the purpose of bringing these causes of actions and claimed causes of action for the benefit of whoever may finally be entitled thereto.

On March 15, 1952, after notice and hearing, the court made an order appointing a receiver for the purposes above indicated.

Findings and Order Appointing Receiver.

The findings recite (App. pp. 52 ff.) that by various proceedings in the consolidated actions, approximately $1,500,000.00 cash, four promissory notes totaling $6,300,000.00, and government bonds in the sum of $5,300,000.00, with attached interest coupons in excess of $500,000.00, had been deposited, and were then on deposit in the District Court; that the bonds had been substituted by the order of the Court for numerous trust deeds; while several hundred more trust deeds still remained in the registry; that further deposits are in the registry of the Court, among others, premiums claimed to be due to the Federal Savings and Loan Insurance Corporation amounting, on the date of the order, to approximately $90,000.00.

It is then found that many conflicting contentions and claims are made concerning the validity of the notes, concerning the conduct of various persons and institutions connected with the execution of the notes, concerning the ownership of the property deposited in the Court; that all claims are inextricably interwoven with each other and with an accounting which respondent Ammann, as con-

servator of Long Beach Federal Savings & Loan Association, had heretofore been ordered to make.

It is further recited that an appeal is pending in the Court of Appeals for the Ninth Circuit (the same appeal, the determination of which this petition and other petitions seek to have reviewed by this Honorable Court); that in spite of the appeal, the Court recognizes "its duty to protect and preserve the property which has been deposited in Court and the rights and claims and liabilities of the various parties thereto."

The findings also recite that some parties to the consolidated actions claim that Ammann's acts as conservator were invalid, while others say that the Long Beach Association, nevertheless, received the benefits of Ammann's acts, but that the statute of limitations on said notes will shortly expire.

It is further found:

> "7. Among other questions arising and requiring decision on the merits of the within litigation are those concerning the validity of the orders which created or attempted to create the San Francisco Bank, and dissolved or attempted to dissolve the Los Angeles Bank and the Portland Bank, and the various related orders concerning the transfer of the property of any or all of said institutions. That there exists the possibility that there may be an ultimate judgment of a competent court holding that said documents designated as promissory notes are invalid, and that there exists, or may have existed, or may exist, causes of action in either the San Francisco Bank or the Los Angeles Bank, or the Portland Bank, whichever one or more may be ultimately held to validly exist, for money had and received, possible

statutory liability, unjust enrichment, account stated, money lent, constructive trust, negligence on the part of past and present officers and directors of the San Francisco Bank, declaratory relief, open book account, and on action-over against the persons, officials and organizations mentioned in paragraph 9 hereof, in addition to causes of action on the face of said notes, and that it is the duty of this Court, among other things, to preserve such causes of action if they exist, and the rights of the parties to assert their existence and the liability of any or all persons who might be ultimately found to be liable."

The order further finds that if the asserted obligation of $6,300,000.00 arising from Ammann's notes is rendered noncollectible by the expiration of the statute of limitations, and if the other causes of action claimed to exist by the various parties are likewise permitted to lapse, the assets on deposit in the District Court would probably become impaired or destroyed, and that the loss would likely be in excess of the present reserves and surplus of the Federal Home Loan banks involved.

On the basis of these facts the Court concluded that the interests of the deposits required the appointment of a receiver for the limited purpose of filing the actions set forth in the findings. As a consequence, the appointment already referred to was made on March 15, 1952. On April 14, 1952, your petitioner was duly substituted for the said Howard V. Calverley (App. 78).

Appeal From Appointment of Receiver.

The appointment of receiver has not remained unchallenged. Appeals were promptly taken by respondents from the appointment as well as from a subsequent order of the District Court allowing the receiver costs to defend the

appeal. These appeals are now pending, but their present status is in doubt because of the decision of the Court of Appeals in the two appeals on account of which this petition is filed, particularly because of the order of the Court of Appeals in Appeal No. 12591, directing the dismissal of the Los Angeles action.

For a better understanding of the significance and necessity of the order appointing a receiver, and in order to show how he comes to occupy the position which he does in this litigation, it is necessary to give a short history of the consolidated actions in which he was appointed.

Seizure of Los Angeles Bank and Long Beach Association.

On March 29, 1946, respondents took possession of the Federal Home Loan Bank of Los Angeles. This was done under three purported administrative orders numbered 5082 to 5084, issued by respondents (App. 31, ff). These orders purported to dissolve and liquidate instantly the Los Angeles Bank to merge it with the Federal Home Loan Bank of Portland and to reconstitute the latter *eo instanto* as the Federal Home Loan Bank of San Francisco.

On May 20, 1946, respondents, relying on Section 5(d) of the Home Owners Loan Act (12 U. S. C. 1461-1468) seized the Long Beach Association [R. 10, 13, 15-16, 304, 8229], and put its affairs in charge of respondent Ammann, as conservator.

Actions of Ammann as Conservator.

When Ammann went into possession of the Long Beach Association, it was not indebted to the Los Angeles Bank or to any other Federal Home Loan Bank or gov-

ernment agency in any amount. On the contrary, Los Angeles Bank held $8,300,000.00 in United States Government bonds for Long Beach Association for safekeeping only [R. 8402]. When Ammann was appointed, these bonds were in the possession of the San Francisco Bank, where orders 5082-5084 had put them.

One of Ammann's first acts was to transfer to the San Francisco Bank $12,000,000.00 in deeds of trust and promissory notes under which Long Beach Association was beneficiary, representing savings deposits of approximately 16,000 depositors of Long Beach Association [R. 8238, 8254, 8296, 43-56, 8421-8518, 8288-8293]. Upon the combined security of $20,000,000.00 he borrowed $7,300,000.00* from San Francisco Bank and signed, as conservator, promissory notes as evidence of the indebtedness [R. 8296, 8403-8406].

These $7,300,000.00, or at least the major percentage of it, came out of and represented seized assets of the Los Angeles Bank which had been obtained by the San Francisco Bank only fifty-five days previously by the seizure of the Los Angeles Bank.

Reaction of Los Angeles Bank and Long Beach Association to Seizures.

On August 27, 1946, the Los Angeles Bank brought an action (the *Los Angeles* action) to quiet title to the seized assets and seeking a judgment directing their return to the Los Angeles Bank [R. 9465-9501]. Several stockholders of Los Angeles Bank as representatives of all stockholders and by way of class action joined in

*During his conservatorship this amount was evidently reduced to the $6,300,000 referred to in the order appointing the receiver.

the suit of the Los Angeles Bank asking identical relief. Wilmington Federal Savings & Loan Association, on whose motion the receiver was later appointed, is one of the class plaintiffs.

Stockholders of Long Beach Association also brought a representative suit on May 27, 1946, entitled "Mallonee v. John H. Fahey" (the *Mallonee* action) [R. 1-26].

When in September, 1946, a three-judge federal constitutional court decided in Los Angeles that the seizure of the Long Beach Association was unconstitutional, respondents promptly appealed to this Honorable Court, which in 1947 held that Section 5(d) of the Home Owners Loan Act did not violate the Federal Constitution, and that such judicial and administrative proceedings as were warranted by law should continue to determine the remaining issues (*Mallonee v. Fahey*, 91 L. Ed. 2030).

Consolidation of Los Angeles and Mallonee Actions.

Vital in both in the *Mallonee* action and in the *Los Angeles* action were the questions whether the Los Angeles Bank still exists, and with whom the many third parties who have intervened in the *Mallonee* action and others should deal. Consequently, on November 7, 1947, the District Court after remand from the United States Supreme Court made an order consolidating both actions for all purposes.

Return of Long Beach Association to Stockholders.

On January 17, 1948 (App. 34) respondents returned the seized Long Beach Association to its management under Order No. 388. At the request of respondents this order was filed in the District Court in the consoli-

dated actions [R. 8318, 10306-10307, 10333-10334] and the Court approved the order.

However, the return of Long Beach Association to its management did not terminate the consolidated actions. On the contrary, they grew in scope. This is recited in greater detail in the petitions of other petitioners. Brief reference thereto, in so far as they affect the status of this petitioner will be made toward the end of this summary. Nor did the return of the association to its management end the stream of interpleaders and deposits in Court which the parties thereto deemed necessary in order to protect themselves in their dealings with the federal home loan banks involved or with the Long Beach Association. The return of the association also revealed certain actions of the conservator Ammann taken while he was in possession of the association which likewise gave rise to further interpleaders and other contentions directly leading to the eventual appointment of a receiver. We shall first summarize the interpleader phase and thereafter the acts of Ammann.

Interpleaders and Deposits in Court's Registry.

Some of the interpleaders allege, in substance, that the respondents, in seizing and liquidating the institutions in question, acted arbitrarily, maliciously, fraudulently, in bad faith, without cause or justification, and as the result of a concerted conspiracy on their part, to destroy these institutions, and to ruin their officers and directors [R. 8218]. They also allege that they were unable to decide for themselves which of the contending Federal Home Loan Banks were entitled to the assets which they were interpleading.

In the course of these interpleaders, there were deposited in the Court the assets referred to in the beginning of this summary. The exact status of these assets remains undecided today. Essentially, these interpled funds represent the life savings of many depositors of federal savings institutions and innocent third persons and assets of the Los Angeles Bank or San Francisco Bank, or Portland Bank, whichever of these exists. Therefore the monies are also the funds of building and loan institutions and of the stockholders of federal home loan banks involved.

Claimed Causes of Action Resulting From Ammann's Conservatorship.

When Ammann returned the Long Beach Association to its owners under Order 388, he returned none of the $12,000,000.00 in trust deeds and none of the $8,300,000.00 of bonds, with the exception of approximately $300,000.00 or $400,000.00 [R. 8564-8567, 8637-8638]. In addition, he announced to Long Beach Association that it was indebted to the San Francisco Bank for nearly $7,000,000.00, that all remaining Long Beach assets were in the hands of the San Francisco Bank as security for the $7,000,000.00 debt which Ammann had created at the inception of his conservatorship. The question of what happened to the $7,000,000.00 obtained from the San Francisco Bank in consequence of the loan of money, is in doubt, and Ammann has not yet accounted to the satisfaction of the District Court [R. 8987-8996].

Long Beach Association claims that the funds Ammann borrowed from the San Francisco Bank were used in a large part to make illegal loans on second or other junior encumbrances; that all these loans, unless

guaranteed by the Federal Housing Authority or the Veterans Administration, are illegal for savings and loan associations to hold; that Ammann falsely stated to these institutions that the loans were in truth first encumbrances and on the basis of such false statements obtained government insurance of said loans; that such insurance if fraudulently obtained is void and unenforceable against the government (*Federal Corp. Insurance v. Merrill,* 92 L. Ed. 10, 332 U. S. 380); that if said loans are actually uninsured they are of little value and illegal assets to be held by the Federal Savings and Loan Association.

The faithful performance of Ammann's duty as conservator is guaranteed by a bond in the penal sum of $100,000.00, issued by the Home Indemnity Company [R. 6391]. If he violated his duty in making the loans, an action lies on his bond. If the loans made to Ammann by San Francisco Bank are lawfully insured by respondent Federal Savings and Loan Insurance Corporation, to which institutions there has been paid approximately $170,000.00* in insurance premiums, computed in part upon the loan of $7,300,000.00, then a cause of action exists against this corporation as well.

San Francisco Bank Refuses to Institute All Claimed Causes of Action.

The San Francisco Bank, however, aware of all these factors, as a party to the consolidated actions, yet refused to sue (1) Ammann, to whom it loaned $7,300,000.00, although the cause of action was about to expire (App. 79-81); (2) Ammann's bonding company, Home In-

*$120,000.00 of the $170,000.00 has been paid into Court in interpleader to preserve the insurance of the depositors' savings.

demnity Company, responsible under its bond for the faithful performance of Ammann's official duties (App. 66, 79, 88); (3) Federal Savings and Loan Insurance Corporation under its insurance of Ammann's loan of $7,300,000.00 (App. 79-81). Instead, the bank was willing to sue only Long Beach Association on Ammann's notes, when grave doubts existed concerning Long Beach Association's liability thereon.

Why the San Francisco Bank refused to sue parties at least *prima facie* liable, can be explained by the District Court's findings appointing a Receiver (App. 81), that all officers, attorneys and personnel of the San Francisco Bank receive their salaries only on the approval of respondents, Home Loan Bank Board, who are the trustees and *alter-ego* of Federal Savings and Loan Insurance Corporation, and whose employee respondent Ammann continues to be.

The very suit filed by the San Francisco Bank, omitting as defendants Ammann, Ammann's bonding company, Home Loan Bank Board, and Federal Savings and Loan Insurance Corporation, had to be approved by the omitted defendants, Home Loan Bank Board, before it could be filed by the San Francisco Bank.

Testimony that the action was so approved was given in the District Court by Mose Silverman, Assistant General Counsel for respondents Home Loan Bank Board (oral testimony affidavit in District Court, March 10, 1952, after close of printed record).

Appointment of Receiver.

At this juncture, and in order that suits would be brought on the causes of action omitted by San Francisco Bank and to prevent the running of the statute of limitations, the Court, on March 15, 1952, appointed Howard V. Calverley receiver for the protection of the funds in the registry of the Court, as stated in the beginning of the summary.

It is noteworthy that a receiver was not appointed until the litigation in the consolidated action had progressed through the District Court, the Court of Appeals and this Honorable Court over a period of six years. During that time, and before your petitioner's appointment, twenty-one writs, appeals and similar appellate proceedings had been taken. In addition, more than fifty final judgments had been entered, quieting title [R. 8288, 8293], interpleading assets [R. 8399, 8525], removing a conservator (App. 34-35), requiring an accounting [App. 34; R. 8318-8319], allowing attorneys' fees [R. 2350-2363], and many others.

Until the 1952 opinions of the Court of Appeals, none of the twenty-one writs or appeals and similar appellate proceedings had been decided against the jurisdiction of the District Court.

When, after all this time and all these proceedings, a receiver was appointed, it was done only for the limited purpose of preserving the notes, deeds of trust, cash, government bonds, causes of action and other assets in the Court's registry, amounting to in excess of $14,000,000.00.

Settlement Negotiations.

Soon after the return of Long Beach Association to its management, settlement negotiations were undertaken, looking toward a solution of the many issues still remaining in the consolidated actions. This brought the main actions, themselves, to a virtual standstill for a period of approximately a year and a half.

Although a number of feasible plans for settlement were suggested by some of the petitioners herein, including restoration of the seized Los Angeles Bank, respondents, although professing acquiescence, never fulfilled such promises [R. 7416-7418, 8216]. In September of 1949, Wilmington Federal Savings and Loan Association made a motion on behalf of the stockholders of the Los Angeles Bank requiring the parties to report on the progress of the settlement negotiations. Before the motion was heard, respondent Home Loan Bank Board issued its Order No. 2015, directed against Long Beach Association, ordering it to appear before the Home Loan Bank Board in Washington to show cause why it should not be liquidated (App. 35).

Further Proceedings in the Consolidated Action.

The motion of Wilmington and the ensuing order of the Home Loan Bank Board immediately brought about further proceedings in the consolidated actions which are described in greater detail in the petitions of some of the other petitioners. For our purposes, it suffices to say that they culminated in two judgments of the District Court, interlocutory in nature:

(1) An interlocutory judgment on December 1, 1949, enjoining further interference with the jurisdiction of the District Court, whether by administrative proceedings or actions in other court, which would in any way affect

the assets in the Court's registry until the Court itself could decide the matter, and

(2) An order allowing the attorneys for the Los Angeles Bank and the stockholders in the Los Angeles action interim, attorneys' fees to recover the seized assets of their clients.

When the Receiver's appointment took place on March 15, 1952, these judgments were under review in the two Appeals Nos. 12511 and 12951, referred to at the outset of this petition.

The Court of Appeals on April 2, 1952, reversed the order granting injunction (in Appeal No. 12511) and a decision reversing the order for attorneys' fees was rendered on November 6, in Appeal No. 12951.

Dismissal of Los Angeles Action.

Your petitioner is not a partisan as to these particular reversals, but is, nevertheless, deeply affected by an order of the Court of Appeals to the lower court appearing in the opinion of November 6 (Appeal No. 12591, p. 101) as follows:

> ". . . we therefore remand the case before us with directions to the lower court to dismiss the Los Angeles action."

The effect of this order dismissing the Los Angeles action upon the status of this Receiver and upon the suits which he has brought pursuant to the order of the United States District Court, was not clear to petitioner, but deeply disturbing to him, and therefore he sought, by a petition for rehearing before the Court of Appeals, to have its opinion modified by rescinding its order dismissing the actions in question. This petition for rehearing was denied on the 17 day of December, 1952.

Jurisdictional Statement.

(a) Jurisdiction of the Supreme Court.

This Honorable Court has jurisdiction to grant petitions for certiorari under 28 U. S. C. 1254.

(b) Jurisdiction of the United States District Court.

(1) In the Mallonee action, the District Court had jurisdiction by reason of allegations invoking the Fifth Amendment of the United States Constitution, the Home Owners Loan Act of 1933 (12 U. S. C. 1461 to 1468), Federal Home Loan Bank Act (12 U. S. C. 1421 to 1449; Judicial Code, par. 57, presently 28 U. S. C. 1655).

(2) In the Los Angeles action, jurisdiction was involved under the Fifth Amendment to the United States Constitution, Federal Home Loan Bank Act, Sections 3, 12, 17, 25 and 26 (12 U. S. C. 1421 to 1449) and paragraph 57 of the Judicial Code (presently 28 U. S. C. Section 1655).

(c) Jurisdiction of the United States District Court Appointing a Receiver.

In connection with the *Mallonee* action, and later in the consolidated *Mallonee* and *Los Angeles* actions, the interpleader jurisdiction of the United States District Court (28 U. S. C. 1335, 1347, 2361, and Rule 22 of Federal Rules of Civil Procedure), was invoked by various interpleader actions, motions and cross-actions. These were filed by depositors, stockholders' protective committees and other parties faced with conflicting demands by reason of the seizure of Long Beach Association and Los Angeles Bank. All of these actions alleged the seizure of the assets of these institutions, totalling approximately $70,000,000.00, and some averred that the seizures were in

excess of statutory authority, malicious, fraudulent, punitive and wholly without cause. These interpleaders resulted in deposits into the registry of the United States District Court of titles to and payments on the homes of approximately eight thousand borrowers from the seized Long Beach Association. The total amount deposited in the registry of the district court in connection with various interpleader proceedings amounted to over $14,000,000.00. The real estate, title to which had thus become involved in the interpleader actions, is situated within the territory of the District Court. The notes, trust deeds, cash and government bonds are physically on deposit with the clerk of the District Court and thus within its territory. It is for the protection of these assets that the receiver herein was appointed.

Questions Presented.

(1) Whether the District Court confronted with complaints raising difficult and complicated constitutional and jurisdictional questions incident to which approximately $14,000,000.00 have been interpled in its registry, must stand idly by and permit loss and destruction of these assets by the running of the statute of limitations where the funds in question represent ultimately the life's savings of thousands of small depositors, or whether he has power, until a decision of the question may be had, to appoint a Receiver for the limited purpose of bringing actions on the assets in the registry to prevent their becoming lost or extinguished by running of the statute of limitations.

(2) Whether consolidated actions alleging the unconstitutional seizure by respondents of a solvent and prosperous savings and loan association and the liquidation of a Federal Home Loan bank in violation of the United

States Constitution and the Federal Home Loan Bank Act present subject matter beyond the jurisdiction of the United States District Court.

(3) Whether the Court of Appeals incident to a decision reversing the granting of interim attorneys' fees in consolidated actions may order them dismissed before the Receiver appointed therein has had an opportunity to be heard in support of the order appointing him.

Reasons Relied on for Allowance of Writ.

1. The opinions of the Court of Appeals pass upon important questions of Federal administrative and constitutional law which have not been but should be settled by this Honorable Court. The difficulty and novelty, as well as the importance of the questions decided by the opinion, are recognized expressly therein. Moreover, the decisions vitally affect the safety and stability of the entire Federal Home Loan Bank and Savings and Loan systems throughout the United States. Millions of depositors and borrowers from more than fifteen hundred federal savings and loan associations, quite apart from state building and loan associations which also have business connections with Federal Home Loan Banks, are all vitally affected by the decisions of the questions presented. The entire national policy should encourage thrift and provide institutions which are impartially and efficiently as well as impersonally supervised. This is of vital concern to all persons entrusting their monies to these institutions. The manner of their administration, their stability and their effectiveness are of vital concern to the saving public and to the building trades engaged in home building, and it is important to know whether improper motives, malice and wilfulness and

fraud may form a legal basis for the actions of supervising authorities who are entrusted with the fate of these institutions, even though their action otherwise remain within the formal framework of the authority conferred.

2. Whether or not the right to review finally exists under the pleadings made in these consolidated actions, it was inevitable that large amounts of assets should find their way into the registry of the court as the outgrowth of the controversy. These monies are largely the life savings of third parties who have no opportunity to represent themselves and protect their interests. It is of the utmost importance for courts to know in constitutional controversies of this type, even though it may eventually be decided that the constitution and federal acts have not been violated, whether courts have power, pending the litigation, to protect the assets of innocent third persons which the controversy has swept into the registry of the court.

3. While the assets deposited in court represent the savings of thousands of depositors and investors, the litigation concerning them is between savings associations and Federal Home Loan banks and shareholders and stockholders of them, all of whom pursue their own particular interests and advantages. The ultimate owners of the assets, namely, the depositors, remain largely inarticulate and perhaps in most instances unaware of the titanic battle that is waged over their assets. Only a receiver can properly represent them and can properly or effectively and impartially take steps to bring actions which will preserve their interests. The necessity of bringing these actions in the present instance is a real one. The possible causes of action which will ultimately

inure to the benefit of the depositors are directed against plaintiffs, as well as defendants in the pending litigation, among others against Long Beach Association, against the conservator and against the Federal Savings & Loan Insurance Corporation.

Results That Will Follow if Receiver Isn't Allowed to Sue.

San Francisco Bank, it is true, has sued Long Beach Association on respondent Amman's note, but if this action does not succeed, and if the statute has been permitted to run in the meantime against other possible defendants, *the result will be the insolvency and bankruptcy of a Federal Home Loan Bank, whether it is the San Francisco Bank, the Los Angeles Bank or the Portland Bank that is finally found to exist.* Admittedly, San Francisco Bank does not have assets sufficient to absorb the loss of these causes of action and still remain solvent. It would be calamitous indeed if the District Court under such a situation had no power to prevent this possible result, and if the Court of Appeals could, by dismissing the action in which the receiver was appointed, deprive the receiver of an opportunity to act even before he has been heard.

Wherefore, Your Petitioner Prays that his petition for a writ of certiorari be granted and that the decision of the Court of Appeals be prevented from becoming final before the necessity or justification for his appointment has been inquired into. He therefore respectfully requests that a writ of certiorari issue under the seal of this court, directed to the Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record

and of the proceedings of said Court of Appeals, had in the cases and numbered on its docket Nos. 12511 and 12591 as follows:

Appeal No. 12511.

Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, *et al.*,

Appellants,

vs.

Mallonee, *et al.*, Shareholders Protective Committee of Long Beach Association, Long Beach Federal Savings and Loan Association, Title Service Company, *et al.*,

Appellees.

and

Appeal No. 12591.

Federal Home Loan Bank of San Francisco, *et al.*,

Appellants,

vs.

Federal Home Loan Bank of Los Angeles, *et al.*,

Appellees.

to the end that these causes may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgments herein of said Court of Appeals be reversed by this Court and for such further relief as to this Court may seem proper.

Dated: Los Angeles, February 4, 1953.

W. I. GILBERT, JR.,

Attorney for Ernest R. Utley as Receiver for Federal Home Loan Bank of Los Angeles, Portland or San Francisco, whichever exists.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.
No. .....

ERNEST R. UTLEY, as Receiver for FEDERAL HOME LOAN BANKS of Los Angeles, Portland, or San Francisco, whichever exists,

Petitioner,

vs.

JOHN H. FAHEY, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Respondents and Appellants Below.

Brief in Support of Petition for Writ of Certiorari

Opinions of Courts Below.

The opinion of the Court in the appeal from the preliminary Injunction (Appeal No. 12511) is reported in 196 F. 2d 336-391.

The opinion of the Court in the appeal from the order allowing interim attorneys' fees (Appeal No. 12591) has not yet appeared in the Federal Reporter as of the date hereof, but copies of the printed opinion of the Court of Appeals have been filed with this Court in connection with the various petitions herein.

Jurisdiction.

1. The dates of the opinions to be reviewed are:

(a) As to Appeal No. 12511, April 2, 1952, rehearing denied December 13, 1952.

(b) As to Appeal No. 12591, November 6, 1952, rehearing denied December 17, 1952.

2. The statutory provision which is believed to sustain the jurisdiction of this court is 28 U. S. C. A. 1254(1).

3. The opinions reverse the following orders of the United States District Court:

(a) An order granting plaintiffs in the consolidated ference with the jurisdiction of the District Court.

(b) An order granting interim attorneys' fees to the attorneys for Los Angeles Bank and Wilmington out of the monies in the court's registry for representing the Los Angeles Bank or the stockholders in the suits testing the validity of the Los Angeles Bank's seizure.

The opinion in Appeal No. 12591, moreover, orders summarily the dismissal of the Los Angeles action.

When such orders and judgments of a United States District Court and of a United States Circuit Court are involved, this Honorable Court can grant certiorari.

Statutes Involved.

The pertinent provisions of the statutes involved on this appeal are set out in a printed appendix filed on behalf of all petitioners. The statutes are:

Home Owners Loan Act, 12 U. S. C. 1461 to 1468. (App. 10.)

Federal Home Loan Bank Act, 12 U. S. C. 1421 to 1449. (App. 4, 8, 9.)

Administrative Procedure Act, 5 U. S. C. 1001 to 1010. (App. 1.)

Federal Interpleader Act, 28 U. S. C. 1335, 1397 and 2361.

Judicial Code, Paragraph 57, 28 U. S. C. 118 (now 1655). (App. 14, 17.)

The administrative orders involved, to-wit: Orders Nos. 5082, 5083, 5084, 5254, 388 and 2015, are likewise set out in the common appendix. (App. 31 ff.)

Statement of the Case.

A statement of the matter involved has already been made in the preceding petition, under the heading "Statement of Matters Involved." This statement is hereby adopted and made a part of this brief.

Specification of Errors.

1. The Court of Appeals erred in holding that the Los Angeles Action did not present justiciable issues and ordering the same dismissed.
2. The Court erred in reversing the District Court's preliminary injunction enjoining the threatened administrative hearing of the affairs of Long Beach Association, while the issues of fraud and wilfulness and unlawfulness in the seizure of the two institutions was still pending, together with numerous interpleader actions.
3. The Court erred in reversing the order of the District Court allowing the attorneys for Los Angeles Bank and the class plaintiffs attorneys' fees to represent the Los Angeles Bank and its stockholders in the actions testing the validity of its seizure and liquidation.
4. The Court erred in making the above orders and decisions while there remained unheard and undecided appeals from the appointment of a receiver in the consolidated action to preserve $14,000,000.00 of interpleaded assets.

Our argument will touch only on this last specification. All others are certain to be treated fully in the briefs of other petitioners.

ARGUMENT.

I.

The United States District Court Had Jurisdiction Over the Consolidated Actions.

The broader aspects of the District Court's jurisdiction over the consolidated actions will not be discussed here, but we make respectful reference to the treatment of that question in other petitions of certiorari filed herein.

II.

The United States District Court Had Jurisdiction to Protect and Decide Upon the Physical Assets Which Had Been Interpled in Its Registry.

The authority of District Courts to protect assets in its registry and custody, whether by the appointment of a receiver or by other appropriate action, has uniformly been upheld.

In *United States v. Morgan* (1939), 307 U. S. 183, 83 L. Ed. 1211, the Supreme Court said at page 193 of U. S.:

> "The district court, in staying the Secretary's order . . . assumed the duty of making the proper disposition of the fund upon the termination of the litigation . . . In taking the payments into custody it acted as a court of equity, charged both *with the responsibility of protecting the fund* and of disposing of it according to law, and free in the discharge of that duty to use broad discretion in the exercise of its powers in such manner as to avoid an unjust or unlawful result. It entered into no contract or understanding with the litigants; it entered into no undertaking as to the manner of dis-

posing of the fund; its duty with respect to it is that prescribed by the applicable principles of law and equity for the protection of the litigants and the public, whose interests the injunction and the final disposition of the fund affect. Inland Steel Co. v. United States, 306 U. S. 153, *ante*, 557, 59 S. Ct. 415, . . ." (Emphasis added.)

In *Natural Gas, etc. v. Fed. Power Comm.* (C. C. A. 7, 1942), 128 F. 2d 481, the court said:

". . . We have, in the exercise of our conferred power, caused a fund to accumulate, and as a court of equity, are charged with the duty of doing complete justice . . . It is placed upon us and upon us alone. We deem it our duty to retain jurisdiction and, as a court of equity, to determine to whom and in what amounts the distribution shall be made. It follows that all parties should be restrained from proceeding in other courts."

In *Market St. Ry. v. Railroad Commission* (1946), 28 Cal. 2d 363, 367, 171 P. 2d 875, 878, the court said:

". . . The excess fares are impounded funds in the custody of the court, although they are represented by the securities on deposit . . . THIS COURT HAS the power and THE RESPONSIBILITY OF PROTECTING THE FUND and of disposing of it in accordance with the applicable principles of law and equity FOR THE PROTECTION OF THE LITIGANTS AND THE PUBLIC WHOSE INTERESTS ARE AFFECTED by the final disposition thereof. The court is said to be free, in the discharge of that duty and responsibility, to use broad discretion in the exercise of its powers so as to avoid an unlawful or unjust result . . ." (Emphasis added.)

In *Vallelunga v. Gomes* (1951), 102 Cal. App. 2d 374, 379, 227 P. 2d 550, 553, in disposing of a fund four years after termination of the action in which it was deposited, the Court said:

> ". . . When a court takes custody of a fund IT ASSUMES AUTHORITY AND RESPONSIBILITY OVER THAT FUND which it does not necessarily lose upon entry of judgment or dismissal of the action. The applicable statute declares that, . . . a court may order money, or other thing capable of delivery, 'deposited in court * * * upon such conditions as may be just, subject to the further direction of the court.' Code Civ. Proc., §572 . . . This does not suggest that the court may make but a first and final order concerning a deposit. It suggests, instead, a continuing jurisdiction over the deposit throughout the period of the court's custody . . . The statute, clearly is consonant with the principle enunciated in *Re* Shyvers, D. C. Cal., S. D., 33 F. Supp. 643, that a court of equity has the duty of administering funds held in the custody of the law, distributing them to such of the parties as, after due hearing, show themselves entitled thereto, a duty which continues even after dismissal of the action in which the court gained custody . . .' . . . *Moneys paid into court to the credit of a suit in equity in the same court are to be disposed of in that suit, and no orders relating to such moneys can properly be made in another suit which does not include the same parties as the former suit.*" 262 N. W. at pages 457-458. (Emphasis added.)
>
> "The four cases last mentioned were cited with approval by our Supreme Court in support of its statement that after dismissal of an action during the pendency of which a court has taken custody of

> a deposit, that court 'has the power to determine the disposition of funds held *in custodia legis* after notice to all parties interested.' Lord v. Superior Court, 27 Cal. 2d 855, 858, 168 P. 2d 14, 15 . . ."

California cases are cited because California law and procedure concerning deposit in court became part of federal procedure of a District Court sitting in California. (F. R. C. P. Rule No. 64.) California Code of Civil Procedure, Section 572, provides for deposit in court of money or other assets in dispute.

It has also been uniformly held that assets *in custodia legis* are subject to the authority of the Court to protect them regardless of the outcome of the litigation.

Menasha Wooden Ware Co. v. Southern Oregon Co. (C. C. A. 9, 1917), 244 Fed. 83, wherein the court said at page 89:

> " 'the court in which a fund has been deposited has power to order distribution of it; and when jurisdiction is once obtained it is not lost either by the abatement of the suit, or by the dismissal of the bill * * *. The court in which the fund is deposited has exclusive jurisdiction of the question of the right to the moneys, and all claims against the deposit must be asserted there.' 13 Cyc. 1038 . . ."

Where the questions presented are difficult and complicated, and where the District Court cannot decide instantly whether or to what extent it has jurisdiction, the injunctive process of the court is available to restrain temporarily any acts on the part of the litigants which would interfere with the *status quo*. This doctrine was recently announced in *United States v. United Mine*

Workers, 918 L. Ed. 884, 910-911, 330 U. S. 258, 289-290, where we read:

> "The government's complaint sought a declaratory judgment in respect to the right of the defendants to terminate the contract by unilateral action. What amounted to a strike call, effective at midnight on November 20, had been issued by the defendant Lewis as an 'official notice.' Pending a determination of defendants' right to take this action, the Government requested a temporary restraining order and injunctive relief. The memorandum in support of the restraining order seriously urged the inapplicability of the Norris-LaGuardia Act to the facts of this case, and the power of the District Court to grant the ancillary relief depended in great part upon the resolution of this jurisdictional question. In these circumstances, *the District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction.*" (Emphasis added.)

If there is equitable power in the courts to enjoin interference with its processes until it can decide whether it has jurisdiction, then by analogy, and *a fortiori,* it must have the equitable power—especially where vital interests of third persons are involved and institutions vital to the general public are threatened with possible insolvency—to appoint a receiver to protect the assets in question until it is decided whether it has jurisdiction. When separate appeals are taken from such an order appointing a receiver, an independent and considered inquiry into the validity of the appointment ought not to be foreclosed by an appellate court summarily dismissing the action before the receiver has even been heard.

III.

If a Constitutional or Federal Question Is Properly Stated, the Complaint Draws With It Into the Jurisdiction of the District Court All Other Matter Raised in the Complaint and the District Court Has Continuing Power to Dispose of All Issues Even Though the Federal or Constitutional Question Are Decided Against the Persons Raising Them.

If the jurisdiction of the District Court has been properly invoked by raising constitutional or federal questions, the power of the District Court extends to every issue raised in the case regardless of the final outcome of the constitutional or federal issue.

In *R. R. Com. of Cal. v. Pacific G. & E. Co.,* 302 U. S. 388, 82 L. Ed. 319, U. S. Supreme Court, 1938. The court said at page 391 of U. S.:

> ". . . Because of the federal question raised by the bill of complaint, the District Court had jurisdiction to determine all the questions in the case, local as well as federal . . . (Citing authorities) . . ."

In *Sterling v. Constantin,* 287 U. S. 378, 77 L. Ed. 375, U. S. Supreme Court, 1932. The Supreme Court said at page 393 of U. S.:

> "As the validity of provisions of the state constitution and statutes, . . . are challenged, the application for injunction was properly heard by three judges . . . THE JURISDICTION of the District Court so constituted, and of this Court upon appeal, EXTENDS TO EVERY QUESTION INVOLVED, . . ." (Emphasis added.)

IV.

Holding Statutes Constitutional Does Not Deprive Court of Jurisdiction.

The original complaints in No. 5421 (the *Mallonee* action), and in No. 5678 (the *Los Angeles Bank* action), and also some amended, supplemental, and later pleadings, alleged a violation of the United States Constitution and of federal acts, so that the District Court's jurisdiction was properly invoked.

The three-judge court in September of 1946, unanimously decided that Section 5(d) of the Home Owners' Loan Act was unconstitutional. The United States Supreme Court in 1947 reversed and held the Act constitutional. Neither decision could alter or remove the jurisdiction of the District Court properly invoked on the constitutional questions in the first instance.

The constitutional question raised by the Los Angeles Bank's seizure, a violation of the Fifth Amendment by denial of due process, has not yet been finally decided by the Supreme Court.

Jurisdiction does not ebb and flow with the successive denials of writs, reversals of judgments, or other proceedings in the many writs and appeals, and six and one-half years of litigation.

Once invoked by the charge of unconstitutional seizure, the jurisdiction of the federal court remains until the final decision of the last issue on the last appeal, whenever that may be.

In deciding the validity of the appointment by a federal court of a receiver for a state savings and loan association, the court said in *Pennsylvania v. Williams,* 294 U.

S. 176, 79 L. Ed. 841, U. S. Supreme Court (1935), and companion cases.*

> ". . . the present bill of complaint . . . properly invokes the power and the authority, conferred upon the district court by the Constitution and statutes of the United States, to entertain the suit. The bill . . . prays relief which a federal court of equity is competent to give . . .
>
> ". . .
>
> ". . . the district court was not without jurisdiction as a federal court, for these are questions which it is competent to decide. It was therefore invested with authority to hear and make disposition of the cause, . . .
>
> ". . . The relief sought, an injunction and the appointment of receivers, was aimed at the prevention of irreparable injury from the waste of the assets . . ."

Jurisdiction to decide whether the complaint is sufficient to state a cause of action inciudes jurisdiction to appoint a receiver to preserve the assets held for six or more years in the registry of the District Court, pending repeated appeals.

In *Bell v. Hood* (1946), 327 U. S. 678, 90 L. Ed. 939, the Supreme Court said at page 682 of the U. S.:

> "Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover . . . Whether

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**Pennsylvania General Casualty v. Schnader*, 294 U. S. 189, 79 L. Ed. 850, U. S. Supreme Court (1935);

Gordon v. Ominsky, 294 U. S. 186, 79 L. Ed. 848, Supreme Court (1935).

> the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy . . . ."

The eventual outcome of the litigation, either in favor of, or against, the sufficiency of the original pleadings, is not decisive of the jurisdiction of the District Court to preserve the subject matter of the litigation for final decision by either the Court of Appeals or the United States Supreme Court. Otherwise appellants, by mere delay, could frustrate and nullify the United States Supreme Court's final decision on the merits of the very issues they raise by their own appeals.

In *Binderup v. Pathe Exchange* (1923), 263 U. S. 291, 68 L. Ed. 308, the Supreme Court said at page 305 of the U. S.:

> "Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a Federal statute presents a case within the jurisdiction of the court as a Federal court; and this JURISDICTION CANNOT BE MADE TO STAND OR FALL UPON THE WAY THE COURT MAY CHANCE TO DECIDE AN ISSUE AS TO THE LEGAL SUFFICIENCY OF THE FACTS ALLEGED any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way, upon either question, is predicated upon the existence of jurisdiction, not upon the absence of it . . . ."

The Supreme Court has said that in certain types of litigation the question of jurisdiction cannot be decided until a decision on the merits. If such a decision on the merits is postponed for six or more years, past the ex-

piration of all applicable statutes of limitation, the District Court into whose custody $14,000,000.00 of savings deposits are interpled, must possess sufficient jurisdiction to preserve and protect the deposited savings. Otherwise, the eventual decision of the merits may be a nullity if the statute of limitations has run and the deposited savings have become valueless.

The Supreme Court recognized this situation and said in *Land v. Dollar* (1947), 330 U. S. 731, 91 L. Ed. 1209, at page 735 of the U. S.:

> ". . . although as a general rule the District Court would have authority to consider questions of jurisdiction on the basis of affidavits as well as the pleadings, *this is the type of case where the question of jurisdiction is dependent on decision of the merits.* . . .
>
> "The allegations of the complaint, if proved, would establish that petitioners are unlawfully withholding respondents' property under the claim that it belongs to the United States. . . .
>
> "If respondents are right in these contentions, their claim rests on their right under general law to recover possession of specific property wrongfully withheld. At common law their suit as pledgors to recover the pledged property on payment of the debt would sound in tort."

Further:

> ". . . But public officials may become tortfeasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, . . . the victim . . . may bring his possessory action to reclaim that which is wrongfully withheld.

"It is in the latter category that the pleadings have cast this case . . .

". . . We only hold that the District Court had jurisdiction to determine its jurisdiction by proceeding to a decision on the merits."

Conclusion.

The order of the Court of Appeals in Appeal No. 12591, prejudices and decides a question yet to be passed upon in pending appeals attacking the position of your petitioner as receiver. He has not yet been heard except by a petition for rehearing in Appeal No. 12591, which was denied.

The summary dismissal of the Los Angeles action denies the receiver an opportunity to justify his appointment and to show why it was necessary.

The seriousness of the order of the Court of Appeals is enhanced by the fact that most of the home owners whose titles and money are ultimately involved in the interpled funds, are not parties to the consolidated actions, and only a receiver appointed for the purpose of preserving their interests, is able to properly protect them.

The dismissal, however, of the Los Angeles action leaves the power of your petitioner suspended, in doubt and probably terminated, unless this Honorable Court grant his urgent request for certiorari to prevent this miscarriage of justice.

Respectfully submitted,

W. I. GILBERT, JR.,

Attorney for Ernest R. Utley, Receiver for Federal Home Loan Bank of Los Angeles, Portland or San Francisco, whichever exists.

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HAROLD B. WILLE

IN THE

Supreme Court of the United States

October Term, 1952
No. 595

MALLONEE, BUCKLIN and FERGUS, Shareholders' Protective Committee, and LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, ROBERT H. WALLIS, GEORGE TURNER, *et al.*,

Petitioners,

vs.

FAHEY, AMMANN, as Conservator, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Respondents.

Robert H. Wallis' and George Turner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

	PAGE
Appeal No. 12511	2
Appeal No. 12591	2

AUTHORITY CITED

CASE	PAGE
Fahey, et al. v. Mallonee, et al., 332 U. S. 245, 91 L. Ed. 2030	3

IN THE

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October Term, 1952
No. .....

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Respondents.

Robert H. Wallis' and George Turner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Robert H. Wallis and George Turner pray that writs of certiorari issue to review the orders and judgments entered April 2, 1952 (rehearing petitions denied Nov. 13, 1952), in Appeal No. 12511, and November 6, 1952 (rehearing petitions denied December 17, 1952), in Appeal No. 12591, in the United States Court of Appeals for the Ninth Circuit, entitled:

Appeal No. 12511.

FAHEY, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Appellants,

vs.

MALLONEE, *et al.*, Shareholders' Protective Committee of Long Beach Association, LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COMPANY, *et al.*,

Appellees.

Appeal No. 12591.

FAHEY, *et al.*,

Appellants,

vs.

MALLONEE, *et al.*,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees.

and respectfully represent as follows:

Petitioners join and adopt as their own petition each of the following petitions of other petitioners:

1. Petitioner Long Beach Federal Savings and Loan Association;

2. Petitioner Mallonee, *et al.*, Shareholders' Protective Committee of the Long Beach Association;

3. Petitioner First Federal Savings and Loan Association of Wilmington;

4. Petitioner Ernest R. Utley, Receiver for the Federal Home Loan Banks of Los Angeles, Portland, and San Francisco;

5. Petitioner Title Service Company; and

6. Petitioner Homeowners.

Petitioners were interpleaders in the District Court. Petitioner Wallis interpled a $50,000.00 cashiers' check. His interpleader was before the United States Supreme Court in 1947 in *Fahey, et al. v. Mallonee, et al.,* 332 U. S. 245, 91 L. Ed. 2030, remanded by the Supreme Court to the District Court for further proceedings.

Petitioner George Turner interpled disputed rental from a hotel owned by the Association, on the ground floor of which the Association maintains its offices. His interpleader was after respondents' final administrative order rescinding the second seizure, and after respondents' refusal of demanded administrative hearings.

Both petitioners were sued as defendants in various class actions by depositors in the seized Association. Both filed their independent cross-claims and counterclaims.

The other petitions, particularly those of the Homeowners and of the trustee, Title Service Company, concerning interpleader, set forth the questions of jurisdiction of the District Court under cross-claims in interpleader similar to the pleadings of Wallis and Turner. To avoid repetition and undue burdening of the Court with numerous petitions, these petitioners join in the petitions listed

in 1 to 6 above, in lieu of repeating for themselves the points already made therein.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Court of Appeals for the Ninth Circuit, had in the above-entitled cases, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said United States Court of Appeals for the Ninth Circuit be reversed by the Court, and for such further relief as to this Court may seem proper.

Respectfully submitted,

RAYMOND TREMAINE,
Attorney for Petitioner Robert H. Wallis;

F. HENRY NECASEK,
Attorney for Petitioner George Turner.

Office - Supreme Court, U.S.
FILED
FEB 9 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1952
No. 596

MALLONEE, BUCKLIN and FERGUS, Shareholders' Protective Committee, LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, and TITLE SERVICE COMPANY, trustee on deeds of trust of 8,000 homeowners, *et al.*,

Petitioners,

vs.

FAHEY, AMMANN, as Conservator, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit by Title Service Company as Trustee on Deeds of Trust of 8,000 Homeowners.

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SUBJECT INDEX

PAGE

Opinions below 3

Jurisdiction 3

Questions presented 4

Statutes involved 4

Statement 5

Specifications of error 13

Reasons for granting the writ 14

1. Public interest 14

2. Co-ordination between courts and agencies prevented 14

3. The District Courts' power to protect the public interest has been denied 16

   (a) The District Court has power to order the deposit of disputed money and property into court pending review of administrative orders 16

   (b) Jurisdiction of cross-claims and counterclaims is not dependent upon jurisdiction of the original complaint 23

   (c) The court has power to instruct a trustee sued by conflicting claimants 24

   (d) Payment into the registry of the court in interpleader is final, and the judgments in interpleader are res judicata 27

Conclusion 28

Appendix reference 29

TABLE OF AUTHORITIES CITED

Cases	Page
Barber Asphalt Corp. v. La Fera, etc., 116 F. 2d 211	23
Dugas v. American Surety, 300 U. S. 414, 81 L. Ed. 720	27, 28
Fahey, et al. v. Mallonee, et al., 332 U. S. 245, 91 L. Ed. 2030	5
Fahey, Ex parte, 332 U. S. 258, 91 L. Ed. 2041	5
Far East Conference v. United States, 342 U. S. 570, 96 L. Ed. 576	19
Federal Power Comm. v. Interstate, etc., Gas, 336 U. S. 577, 93 L. Ed. 895	18
General Amer. T. Car Corp. v. El Dorado, etc., 308 U. S. 422, 84 L. Ed. 361	19
Inland Steel Company v. United States, 306 U. S. 153, 83 L. Ed. 557	19
Isenberg v. Biddle, 125 F. 2d 741	24
Lion Mfg. Corp. v. Chicago Flexible, etc., 106 F. 2d 930	24
Mosser v. Darrow, 341 U. S. 267, 95 L. Ed. 927	26
Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 319	19
Public Service Comm. of the State of Missouri v. Brashear Freight Lines, Inc., 312 U. S. 621, 85 L. Ed. 1083	24
Railway Express v. Jones, 106 F. 2d 341	24
Redmond v. Commerce Trust Co., 144 F. 2d 140; cert. den., 323 U. S. 776, 89 L. Ed. 620	26
San Diego Flume Co. v. Souther, 90 Fed. 164	24
Scripps-Howard v. F. C. C., 316 U. S. 4, 86 L. Ed. 1229	15
Stoll v. Gottlieb, 305 U. S. 165, 83 L. Ed. 104	28
Sunflower Oil Company v. Wilson, 142 U. S. 313, 35 L. Ed. 1025	24
Texas v. Florida, 83 L. Ed. 817, 306 U. S. 398	12
Thompson v. Texas Mexican R. R. Co., 328 U. S. 134, 90 L. Ed. 1132	19
Treinies v. Sunshine Mining Co., 308 U. S. 66, 84 L. Ed. 85	9, 28

PAGE

United State v. Interstate Commerce Comm., 337 U. S. 426, 93 L. Ed. 1451 19

United States v. Morgan, 307 U. S. 183, 83 L. Ed. 1211, 307 U. S. 191 ..... 16, 18

Vidal v. South American Securities Co., 276 Fed. 855 23

STATUTES

Federal Home Loan Bank Board Administrative Order No. 388 6

Federal Rules of Civil Procedure, Rule 22 20

United States Code, Title 5, Secs. 1001-1011 4

United States Code, Title 5, Sec. 1009(d) 14

United States Code, Title 28, Sec. 41(26) 11, 20, 27

United States Code, Title 28, Sec. 1335 ..... 4, 9, 11

United States Code, Title 28, Sec. 1397 ..... 4, 9, 11

United States Code, Title 28, Sec. 2354(1) 3

United States Code, Title 28, Sec. 2361 ..... 4, 9, 11

PETITION FOR A WRIT OF CERTIORARI

IN THE

Supreme Court of the United States

October Term, 1952

No. .....

MALLONEE, BUCKLIN and FERGUS, Shareholders' Protective Committee, LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, and TITLE SERVICE COMPANY, trustee on deeds of trust of 8,000 homeowners, *et al.*,

Petitioners,

vs.

FAHEY, AMMANN, as Conservator, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit by Title Service Company as Trustee on Deeds of Trust of 8,000 Homeowners.

To the Honorable Fred M. Vinson, Chief Justice and to the Honorable Associate Justices of the Supreme Court of the United States:

Title Service Company, as trustee on deeds of trust of 8,000 homeowners, prays that writs of certiorari issue to review the following decisions of the United States Court of Appeals for the Ninth Circuit:

1. Order and judgment entered April 2, 1952, in which rehearing was denied November 13, 1952, in Appeal No. 12511, entitled:

FAHEY, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Appellants,

vs.

MALLONEE, *et al.*, Shareholders' Protective Committee of Long Beach Association, LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, and TITLE SERVICE COMPANY, *et al.*,

Appellees.

wherein the Court of Appeals reversed a judgment of the United States District Court for the Southern District of California, Central Division, and held that the cross-claim and interpleader of Title Service Company failed to state a claim upon which *any* relief could be granted by a Federal Court.

2. Order and judgment entered November 6, 1952, in which rehearing was denied December 17, 1952, in Appeal No. 12591, entitled:

FAHEY, *et al.*,

Appellants,

vs.

MALLONEE, *et al.*,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees.

wherein the Court of Appeals reversed an order of the United States District Court for the Southern District of California, Central Division, and held that the District Court was without jurisdiction of the subject matter and without jurisdiction *in personam* over Respondents, government officials, residents of Washington, D. C.

Opinions Below.

As to Appeal No. 12511:

The Preliminary Injunction with Findings made by the District Court is unreported, but will be found in Volume XVIII of the printed record on appeal, pages 8187 to 8537, inclusive.

Opinion of the Court of Appeals is reported in 196 F. 2d 336.

As to Appeal No. 12591:

The opinion and order of the District Court is unreported, and the opinion of the United States Court of Appeals has not yet been published in the records. It is filed herewith in slip opinion form.

Jurisdiction.

Jurisdiction of this United States Supreme Court to review these cases is invoked under Title 28, U. S. C., Section 2354(1).

This petitioner adopts the statements as to jurisdiction of the United States Supreme Court, and jurisdiction of the District Court, as set forth in all petitions of the other petitioners in these cases.

Questions Presented.

The questions presented in this petition are:

1. Can the Title Service Company, as trustee for 8,000 homeowners, be prevented from applying for and securing interpleader relief against multiple conflicting claims because one of the claimants to funds has not exhausted its administrative remedy?

2. Must a trustee decide conflicting claims at its own peril, and either convey to one claimant only, or refuse all conveyance of real property, pending administrative hearings available only to conflicting claimants?

3. Can a court of equity accept deposits into court of disputed payments of money, to protect the public interest and to preserve the status and rights of parties, pending court review of administrative seizures which caused the disputes?

4. Can a court accept payment in full into court and discharge thousands of homeowners from the conflicting claims of litigants, pending court review of administrative seizures, which will be decisive of the conflicting claims?

Petitioner adopts the Questions presented in all other petitions of all other petitioners in these cases in addition to the above statements.

Statutes Involved.

Re Interpleader, Title 28, U. S. C., Sections 1335, 1397 and 2361;

Administrative Procedure Act, Title 5, U. S. C., Sections 1001-1011, inclusive.

Also petitioner adopts the Statutes Involved in all other petitions of all other petitioners in these cases.

Statement.

Titles to the homes of 8,000 borrowers from a Federal Savings and Loan Association, are threatened with foreclosure by respondents,—foreclosure of *loans which the borrowers have paid in full,* by deposit in interpleader into the registry of the District Court of approximately $14,000,000.00. [R. 8288-8293, Apl. 12511.] (See Appx. p. 40.) By final interpleader judgments of the District Court in 1948 (and prior thereto), titles to the borrowers' homes were cleared and quieted against respondents' conflicting claims. [R. 8526-8537, Apl. 12511.]

Appeals were taken and dismissed from several of such judgments. [R. 3152, 3976-3978, Apl. 12511.] The others became final from failure to appeal therefrom.

The original interpleader proceedings of this trustee, and of several hundred of the borrowers, were before the United States Supreme Court in 1947 in *Fahey, et al. v. Mallonee, et al.,* 332 U. S. 245, 91 L. Ed. 2030, and *Ex parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041. Respondents at that time sought dismissal of the interpleader cross-claims and interventions. Dismissal was refused by the Supreme Court, and the case remanded to the District Court for further proceedings. [R. 2302-2304, Apl. 12511.] Such further proceedings were had in reliance on the Supreme Court mandate. They resulted in the quiet title judgments in favor of the homeowners and against the respondents. [R. 8288-8293, Apl. 12511.]

On more than 50 separate occasions, the District Court made quiet title judgments.[1]

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[1]See footnote 15 of Preliminary Injunction on Appeal No. 12511, R. 8288-8293.

The Home Loan Bank Board, on January 17, 1948, issued its Order No. 388 (see Appx. pp. 34-35), which read in part:

> ". . . the . . . Order . . . appointing a Conservator for the Long Beach Federal Savings and Loan Association . . . is hereby rescinded, . . ."

No administrative hearing could result in anything more final. Nor, could an administrative hearing reviewed by a court, result in anything more final than the judgment of January 23, 1948, of the District Court, which read in part [R. 8321, Apl. 12511]:

> "It Is Further Ordered that possession, management, control, custody and operation, and all evidences of title and/or ownership of all property, . . . real, personal, or mixed, . . . shall be transferred and moved from and by said defendant, A. V. Ammann, as such conservator . . . and shall pass and be delivered to the Long Beach Federal Savings and Loan Association . . ."

The administrative process had been "exhausted" by respondents' final administrative Order No. 388, removing the conservator and ordering him to account. Judicial review had proceeded to the point of judgment enforced by the removal of the conservator, and quieting title against him. No appeal was taken and the judgment was final.

In January of 1948, *after* final administrative Order No. 388, the Court removed Ammann and quieted title against him [R. 8310-8328, Apl. 12511.] In March of 1948, *after* final administrative Order No. 388, the Court quieted title against the San Francisco Bank as to the

notes and deeds of trust. No appeal was ever taken from either of such final orders.

The District Court found in making the order quieting title against the San Francisco Bank, in part, as follows [R. 8410-8411, Apl. 12511]:

> ". . . That among the injuries which would flow to said homeowners, and borrowers and purchasers by failing to require such deposit pending the final judgment in the within action, are (1) the inability of said thousands of borrowers and homeowners to secure a merchantable, or insurable title to the particular real property involved, which in turn would prevent either a sale thereof, or a loan or refinancing thereon, or a payment and termination of the interest and obligations of the present loans and deeds of trust thereon, and (2) a multiplicity of suits which might involve all of the issues raised, or which can be raised, in the instant litigation, and all of the parties to the present litigation; which injuries and damage are found to be grave, irreparable and continuing as to the thousands of borrowers and homeowners who have given their notes and deeds of trust to said Long Beach Federal Savings and Loan Association and conveyed the titles to their homes as security for said loans."

And ordered [R. 8533-8534, Apl. 12511]:

> "The lien and obligation and charge of the claims of the Federal Home Loan Bank of Portland, sometimes known as Federal Home Loan Bank of San Francisco, and/or Federal Home Loan Bank of San Francisco, and/or Federal Home Loan Bank of Los Angeles (or either or both, or the total combined amount of said claims) and either or both of the same are hereby lifted and removed from the said

notes and deeds of trust and each and all of them and are transferred to, and restricted to, and shall be claims to, and obligations upon, the said sum of $5,300,000.00 in bonds herein ordered deposited in Court and such additional sum in money from the sum in excess of $1,500,000.00 already in the Registry of this Court, sufficient to make the combined total sum of $6,324,098.35 with interest on $6,300,000.00 at 2% per annum from March 10, 1948 until paid . . .

". . .

"It is further ordered that any and all endorsements appearing on each or any of the notes and trust deeds hereinafter described in favor of said Federal Home Loan Bank of San Francisco and any and/or all instruments assigning or transferring or purporting to assign or transfer said notes and/or trust deeds are hereby cancelled, and the title thereto and to each and every of such trust deeds and notes, if any title passed from said Long Beach Federal Savings and Loan Association, is hereby revested in said Long Beach Federal Savings and Loan Association."

In reliance upon these 1948 and prior judgments of the District Court, the title insurance companies (without whose approval titles to real estate are unmerchantable in California) guaranteed titles and thousands of homeowners have made monthly payments upon the loans on their homes and approximately $5,000,000.00 of such loans have been paid in full.

In 1952, the Court of Appeals, without notice to the borrowers, vacated the 1948 interpleader injunctions, preventing foreclosure, and permitted respondents Federal Home Loan Bank of San Francisco to file in the state

courts, an action to foreclose the titles to the thousands of borrowers' homes, quieted and cleared under proceedings based upon the original 1946 interpleader of petitioner Title Service Company [R. 43-56, Apl. 12511], as trustee.

The Court of Appeals, in its decisions, held that although the judgments were final and unattacked for more than four years, nevertheless, the actions in which the homeowners' titles were quieted should be dismissed as beyond the jurisdiction of the District Court. (Op. in Apl. 12591, pp. 62, 94 and 96.)

The decisions also hold that the District Court lacked PERSONAL jurisdiction of the respondents, Government officials, residents of Washington, D. C. (Op. in Apl. 12591, pp. 95-96.) This despite the fact that *interpleader jurisdiction of the United States District Court is nationwide,*[2] and despite the fact that the elements of interpleader jurisdiction exists and were alleged in this petitioner's pleadings in interpleader. [R. 1-26, 43-56, 86-100, 286-302, 303-361, 766-780, 2960-3098, 3184-3365, 3461-3491, 3562-3597, Apl. 12511.]

The pleadings show that Fahey, Ammann, Home Loan Bank Board, *et al.,* are officially citizens of the District of Columbia, and individually of Massachusetts, Maryland, Ohio, New Jersey, and North Carolina. They seized title to, and possession of, several thousand original notes and deeds of trust evidencing title to the homes of several thousand borrowers. [R. 3257-3258, Apl. 12511.] (See

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[2](See Appendix pp. 14-17.) Title 28, U. S. C., Sec. 41(26), as it existed in 1946, now Title 28, U. S. C., Secs. 1335, 1397 and 2361. See also, *Treinies v. Sunshine Mining Co.,* 308 U. S. 66, 84 L. Ed. 85 (1940).

Appx. pp. 40-46, Plate 5.) Petitioner, a California corporation, and a citizen of California, was trustee upon those seized notes and deeds of trust, the aggregate face value of which exceeded $12,000,000.00.

The depositors' Protective Committee, Mallonee, *et al.*, sued for the return of their seized savings. [R. 1-26, Apl. 12511.] They were citizens of California, suing on behalf of the class of 16,000 savings depositors, and joined this petitioner, Trustee, as defendant [R. 153-154, Apl. 12511] in the action against respondents for the return of their seized assets.

The seizing conservator, Ammann, originally demanded of this petitioner, reconveyances of certain of the aforementioned trust deeds and notes amounting to $800,000.00. Successive demands were made eventually aggregating several millions of dollars.

Because many of the notes and trust deeds disclosed assignment and transfer by endorsement to respondent Federal Home Loan Bank of San Francisco (see Appx. pp. 40-41, Plate 5), all of the conflicting claims of the Federal Home Loan Bank seizure, described at greater length in the petitions of the Long Beach Federal Savings and Loan Association, and its Shareholders' Protective Committee, Mallonee, *et al.*, were placed upon the titles to the homes of the 8,000 borrowers.

The claimants under the Federal Home Loan Bank seizure were the Federal Home Loan Banks of Portland, Oregon, Los Angeles, California, and/or San Francisco, California, whichever exists.

The depositors' protective committee claimed the seizures and assignments of the trust deeds, representing

their seized savings, were unconstitutional, illegal, fraudulent, and invalid.[3]

Conflicting and contradictory claims by citizens of diverse citizenship, exceeding $500.00, were thus presented to, and asserted against, petitioner trustee.

As a result of the conflicting claims, this petitioner, as trustee, invoked the original nationwide interpleader jurisdiction of the District Court by cross-claim and counterclaim in interpleader, in the action in which petitioner had been sued as a defendant by the Shareholders' Protective Committee, Mallonee, *et al.* [R. 153-154, 43-56, Apl. 12511.]

Interpleader summons was issued, together with appropriate orders for service on absent defendants. [R. 80, 799, 81-82, 444-445, Apl. 12511.] Service of such process was made in 1946 in the District of Columbia by the United States Marshal there, upon respondent Fahey, then the one-man Federal Home Loan Bank Administration.[4] PERSONAL jurisdiction over Fahey and his successors Home Loan Bank Board was thereby obtained.[5]

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[3]Appeal No. 12511 (C. C. A. 9), Vol. I: R. 294-295, 330-331, 338, 349-350; Vol. II: R. 573-574, 583; Vol. VII: R. 3193-3194, 3207, 3251-3253, 3288, 3291, 3299, 3301-3303, 3308, 3320-3321; Vol. XX: R. 9470, 9476, 9484, 9491-9493.

[4]Title 28, U. S. C., Sec. 41(26), as it existed in 1946, now Title 28, U. S. C., Secs. 1335, 1397 and 2361. (See Appendix p. 14.)

[5]Respondents' brief to the United States Supreme Court in 1946, states in part:

(Page 9): "On June 4, 1946, Title Service Company, trustee under numerous deeds of trust securing loans made by the Association, filed an . . . cross-claim in interpleader, . . ."

(Page 10): "On June 12, 1946, one Robert H. Wallis filed another . . . cross-claim in interpleader, . . ."

(Page 11): "Service of process upon Fahey under both cross-claims in interpleader was made in the District of Columbia. . . ."

In *Texas v. Florida,* 83 L. Ed. 817, 306 U. S. 398, U. S. Supreme Court 1938, the Supreme Court at pages 405-406, said:

> "Before the Constitution was adopted a familiar basis for the exercise of the extraordinary powers of courts of equity was the avoidance of the risk of loss ensuing from the demands and separate suit of rival claimants to the same debt or legal duty. . . . Since, without the interposition of equity, each claimant in pursuing his remedy in an independent suit might succeed and thus subject the debtor or the fund pursued to multiple liability, equity gave a remedy by way of bill of interpleader, upon the prosecution of which it required the rival claimants to litigate in a single suit their ownership of the asserted claim . . .
>
> ". . . The object and ground of the jurisdiction are to guard against the consequent depletion of the fund at the expense of the plaintiff's interest in it and to protect him and the other parties to the suit from the jeopardy resulting from the prosecution of numerous demands, to only one of which the fund is subject. While in point of law or fact only one party is entitled to succeed, there is danger that recovery may be allowed in more than one suit. Equity avoids the danger by requiring the rival claimants to litigate before it the decisive issue, . . ."

Specifications of Error.

The Court of Appeals erred in Appeals No. 12511 and No. 12591, when it held:

1. That the District Court did not have personal jurisdiction over respondents, as to $14,000,000.00 of money and assets physically on deposit in the registry of the District Court in Interpleader.

2. That the District Court could neither stay nor enjoin final administrative seizures by respondents pending the Court's review of constitutionality or legality thereof.

3. That the actions must be dismissed, notwithstanding judgments four years final from lack of appeal, quieting titles to the homes of the 8,000 borrowers.

4. That it could vacate interpleader injunctions, four years final, and permit foreclosure of thousands of home loans, paid in full by deposit of $14,000,000.00 into the District Court in interpleader.

Petitioner also adopts all of the Specifications of Error of all other petitioners.

Reasons for Granting the Writ.

1. PUBLIC INTEREST.

Other petitions state in explicit detail the nationwide impact of the Court of Appeals' decisions upon the Federal Savings System and the millions of people and billions of dollars of savings and homes directly and immediately affected thereby. To avoid repetition, petitioner adopts and incorporates by reference herein, the sections on public interest of such other petitions.

The Court of Appeal's opinions have immediate and disastrous consequence to all affected in any way by administrative boards, bureaus or agencies. In view of the vast field of adjudication, legislation and enforcement by administrative officials, every citizen affected by Administrative authority, State or Federal, is hurt by the decisions of the Court of Appeals.

2. CO-ORDINATION BETWEEN COURTS AND AGENCIES PREVENTED.

The Court of Appeals' opinions repudiate and reverse the doctrine of cooperation between the courts and the administrative agencies. The Administrative Procedure Act was promulgated with the view of integrating our administrative and court systems and so provide more flexible and efficient service for the public.

The Administrative Procedure Act, Title 5, Section 1009 U. S. C., subdivision (d), reads in part:

> ". . . Upon such conditions as may be required and to the extent necessary to prevent irreparable

> injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) IS AUTHORIZED TO ISSUE ALL NECESSARY AND APPROPRIATE PROCESS TO POSTPONE THE EFFECTIVE DATE OF ANY AGENCY ACTION OR TO PRESERVE STATUS OR RIGHTS PENDING CONCLUSION OF THE REVIEW PROCEEDINGS." (Emphasis added.)

The Court of Appeals expressly holds the Administrative Procedure Act applies to respondents in the Federal Savings and Loan Association seizure.[6] It also holds the reviewing court had full authority to preserve the status of any of the litigants, and cites:

> *Scripps-Howard v. F. C. C.* (1942), 316 U. S. 4, 86 L. Ed. 1229.

Notwithstanding such holding, it orders dismissal of the actions, reversal of the injunction, and nullification of the quiet title judgments.

The Supreme Court said in the *Scripps-Howard v. F. C. C.*, at page 15 of the U. S.:

> ". . . Unless Congress explicitly discloses such an intention we should not lightly attribute to it a desire to withhold from a reviewing court the power to save the public interest from injury or destruction while an appeal is being heard. To do so would stultify the purpose of Congress to utilize the courts as a means for vindicating the public interest. Courts and administrative agencies *are not to be regarded as competitors* in the task of safeguarding the public interest. . . ." (Citing authorities.) (Emphasis added.)

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[6]But does not apply in the Federal Home Loan Bank seizure (a conflict discussed by other petitioners).

And again in *United States v. Morgan* (1939), 307 U. S. 183, 83 L. Ed. 1211, the Supreme Court, at page 191 of 307 U. S. said:

> ". . . court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice . . . neither can rightly be regarded by the other as an alien intruder, . . ."

See also Table of Cases *re* deposit into Court, pages I to VI hereof for further Supreme Court decisions.

The long-established, accepted and usual cooperation between courts and agencies, whereby the reviewing court, by injunction or stay and instructions, preserves the public interest and the rights of the litigants pending final administrative action and judicial review, is rejected and ignored by the Court of Appeals' opinions.

3. THE DISTRICT COURTS' POWER TO PROTECT THE PUBLIC INTEREST HAS BEEN DENIED.

By holding the District Court wholly without jurisdiction to grant ANY relief in the public interest to protect the thousands of homeowner-borrowers, the Court of Appeals' opinions are contrary to a multitude of Supreme Court decisions approving exercise of such equitable powers in a wide variety of cases.

(a) The District Court Has Power to Order the Deposit of Disputed Money and Property Into Court Pending Review of Administrative Orders.

Following is a table of cases in which the United States Supreme Court has approved deposit into Court, or other judicial custody of disputed money payments, pending Court determination. The review has sometimes been on

Table of Cases in Which Has Approved Deposit Into Custody of Disputed Payments,

LITIGATION AND CITATIONS	AMOUNT OF FUND IN CUSTODY OF COURT	NUMBER OF YEARS IN LITIGATION	CIT AP DI
MORGAN CASES (Involving Kansas City Stockyards Rates) (1) 8 F. Supp. 766 (1934) (2) 298 U. S. 468, 88 L. Ed. 1288 ——— (3) 23 F. Supp. 380 (4) 304 U. S. 1, 82 L. Ed. 1129 ——— (5) 24 F. Supp. 214 (6) 307 U. S. 183, 83 L. Ed. 1211 ——— (7) 32 F. Supp. 546 (8) 313 U. S. 409, 85 L. Ed. 1429 (1941)	$586,093.52	8	30 1 8 1
INTERSTATE NATURAL GAS COMPANY LITIGATION (Involving rates of consumers in several states) (1) 156 F. 2d 949 (1946) (2) 331 U. S. 682, 91 L. Ed. 1742 ——— (3) 166 F. 2d 796 (4) 336 U. S. 577, 93 L. Ed. 895 (5) 181 F. 2d 833 (1950)	$2,500,000.00	7	336 5 9 9

Table of Cases in Which the U. S. Supreme Court Has Approved Deposit Into Court, or Other Judicial Custody of Disputed Payments, Pending Court Determination

LITIGATION AND CITATIONS	AMOUNT OF FUND IN CUSTODY OF COURT	NUMBER OF YEARS IN LITIGATION	CITATIONS OF APPELLATE OR SUPREME COURT APPROVAL OF DEPOSIT OR DISTRIBUTION OF FUND	TYPE OF REVIEW — CONSTITUTIONAL, STATUTORY, OR OTHER	AGENCY REVIEWED
MORGAN CASES (Involving Kansas City Stockyards Rates) (1) 8 F. Supp. 766 (1934) (2) 298 U. S. 468, 88 L. Ed. 1288 ——— (3) 23 F. Supp. 380 (4) 304 U. S. 1, 82 L. Ed. 1129 ——— (5) 24 F. Supp. 214 (6) 307 U. S. 183, 83 L. Ed. 1211 ——— (7) 32 F. Supp. 546 (8) 313 U. S. 409, 85 L. Ed. 1429 (1941)	$586,093.52	8	307 U. S. 183, 185-198 83 L. Ed. 1211, 1214-1221	Statutory	Secretary of Agriculture, United States Government.
INTERSTATE NATURAL GAS COMPANY LITIGATION (Involving rates of consumers in several states) (1) 156 F. 2d 949 (1946) (2) 331 U. S. 682, 91 L. Ed. 1742 ——— (3) 166 F. 2d 796 (4) 336 U. S. 577, 93 L. Ed. 895 (5) 181 F. 2d 833 (1950)	$2,500,000.00	7	336 U. S. 577, 582-584, 93 L. Ed. 895, 902-903	Statutory	Federal Power Commission

LITIGATION AND CITATIONS	AMOUNT OF FUND IN CUSTODY OF COURT	NUMBER OF YEARS IN LITIGATION	CITATIONS OF APPELLATE OR SUPREME COURT APPROVAL OF DEPOSIT OR DISTRIBUTION OF FUND	TYPE OF REVIEW — CONSTITUTIONAL, STATUTORY, OR OTHER	AGENCY REVIEWED
NATURAL GAS PIPELINE COMPANY LITIGATION (Involving rates of 750,000 consumers) (1) 120 F. 2d 625 (1941) (2) 315 U. S. 575, 86 L. Ed. 1037 ——— (3) 128 F. 2d 481 (4) 129 F. 2d 515 (5) 131 F. 2d 137 ——— (6) 141 F. 2d 27 (7) 324 U. S. 138, 89 L. Ed. 801 (1945)	$6,377,913.52	6	128 F. 2d 481, 485-486 324 U. S. 138, 139-140 89 L. Ed. 801, 805	Statutory	Federal Power Commission
INLAND STEEL CO. LITIGATION (Involving illegal rebates by railroad) (1) 23 F. Supp. 291 (2) 306 U. S. 153, 83 L. Ed. 557	Not indicated	5	306 U. S. 153, 158 83 L. Ed. 557, 561	Statutory	Interstate Commerce Commission ——— Order directing railroad to cease preferential allowances
MARKET STREET RY. CO. LITIGATION (Involving fares of San Francisco Street car patrons) (1) 24 Cal. 2d 378 (1944) (2) 324 U. S. 548, 89 L. Ed. 1171 ——— (3) 28 Cal. 2d 363 (4) 329 U. S. 793, 91 L. Ed. 678	$705,794.96	3	324 U. S. 548, 552 89 L. Ed. 1171, 1177 28 Cal. 2d 363, 367, 329 U. S. 793, 91 L. Ed. 678	Statutory, in California Supreme Court. ——— Constitutional, in U. S. Supreme Court (XIVth Amendment, due process) 324 U. S. 548, 553, 89 L. Ed. 1171, 1177-1178	California Railroad Commission

LITIGATION AND CITATIONS	AMOUNT OF FUND IN CUSTODY OF COURT	NUMBER OF YEARS IN LITIGATION	CITATIONS OF APPELLATE OR SUPREME COURT APPROVAL OF DEPOSIT OR DISTRIBUTION OF FUND	TYPE OF REVIEW — CONSTITUTIONAL, STATUTORY, OR OTHER	AGENCY REVIEWED
CONSOLIDATED GAS CO. LITIGATION (Involving gas rates for New York City) (1) 256 F. 238 (1919) (2) 260 F. 1022 (3) 253 U. S. 219, 64 L. Ed. 870 ——— (4) 267 F. 231 (5) 274 F. 986 (6) 258 U. S. 165, 66 L. Ed. 538 ——— (7) 259 U. S. 101, 66 L. Ed. 844 ——— (8) 291 F. 704 (9) 265 U. S. 78, 68 L. Ed. 909 (1924)	One-third of N. Y. City gas rates for 18 months	6	258 U. S. 165, 177-178 66 L. Ed. 538, 548-549	Constitutional (XIVth Amendment, Due Process) 253 U. S. 219, 221, 64 L. Ed. 870, 871 258 U. S. 165, 171, 66 L. Ed. 538, 546	New York State Public Service Commission
LINCOLN GAS & ELECTRIC CO. LITIGATION (Involving gas rates of 25,000 Lincoln, Neb., consumers) (1) 182 F. 926 (1909) (2) 223 U. S. 349, 56 L. Ed. 466 (3) 250 U. S. 256, 63 L. Ed. 968 ——— (4) 253 U. S. 477, 64 L. Ed. 1022 (5) 256 U. S. 512, 65 L. Ed. 1066 (6) 257 U. S. 6, 66 L. Ed. 101	$575,000.00 bond mentioned	16	223 U. S. 349, 365, 56 L. Ed. 466, 473 250 U. S. 256, 259, 63 L. Ed. 968, 973 256 U. S. 512, 65 L. Ed. 1066 257 U. S. 6, 66 L. Ed. 101	Constitutional (XIVth Amendment, Due Process) 250 U. S. 256, 259 63 L. Ed. 968, 973	City Council of Lincoln, Nebraska
LOUISVILLE TEL. & TEL. CO. LITIGATION (Involving telephone rates for city of Louisville, Ky.) (1) 231 U. S. 639, 58 L. Ed. 413 (2) 231 U. S. 652, 58 L. Ed. 419	$100,000.00 bond mentioned	6	231 U. S. 652, 653, 58 L. Ed. 419	Constitutional (XIVth Amendment, Due Process) 231 U. S. 639, 58 L. Ed. 413	City Council of Louisville, Ky.

LITIGATION AND CITATIONS	AMOUNT OF FUND IN CUSTODY OF COURT	NUMBER OF YEARS IN LITIGATION	CITATIONS OF APPELLATE OR SUPREME COURT APPROVAL OF DEPOSIT OR DISTRIBUTION OF FUND	TYPE OF REVIEW — CONSTITUTIONAL, STATUTORY, OR OTHER	AGENCY REVIEWED
CENTRAL KENTUCKY GAS CO. LITIGATION (Involving consumers of Lexington, Kentucky) (1) 37 F. 2d 938 (1930) (2) 60 F. 2d 137 (3) 290 U. S. 264, 78 L. Ed. 307 ——— (4) 260 Ky. 361, 85 S. W. 2d 870 (5) 297 U. S. 537, 80 L. Ed. 850 (1936)	$1,000,000.00	7	290 U. S. 264, 271-272 78 L. Ed. 307, 312-313 297 U. S. 537, 80 L. Ed. 850	Constitutional (XIVth Amendment, Due process) 290 U. S. 264, 270-271 78 L. Ed. 307, 312 297 U. S. 537, 539 80 L. Ed. 850, 852	Railroad Commission of Kentucky
ARKANSAS RATE CASES (Involving railroad rates in State of Arkansas) (1) 163 F. 141 (1908) (2) 168 F. 720 ——— (3) 187 F. 290 (4) 230 U. S. 553, 57 L. Ed. 1625 ——— (5) 249 U. S. 134, 63 L. Ed. 517 (6) 255 U. S. 252, 65 L. Ed. 614 (1921)	$400,000.00 of bonds, plus "additional" bonds mentioned	14	290 U. S. 134, 137-142 63 L. Ed. 517, 521-523 255 U. S. 252, 253, 65 L. Ed. 614, 615	Constitutional (XIVth Amendment, Due process) 249 U. S. 134, 137-138 63 L. Ed. 517, 521	Railroad Commission of Arkansas
PACIFIC GAS & ELECTRIC CO. LITIGATION (Involving gas rates to consumers in northern half of California) (1) 5 F. Supp. 878 (1934) ——— (2) 13 F. Supp. 931 (3) 16 F. Supp. 884 (4) 302 U. S. 388, 82 L. Ed. 319 (5) 26 F. Supp. 507 (1939)	$3,500,000.00	6	Not mentioned	Constitutional (XIVth Amendment, Due process) 302 U. S. 388, 390-391, 82 L. Ed. 319, 321	Railroad Commission of California

LITIGATION AND CITATIONS	AMOUNT OF FUND IN CUSTODY OF COURT	NUMBER OF YEARS IN LITIGATION	CITATIONS OF APPELLATE OR SUPREME COURT APPROVAL OF DEPOSIT OR DISTRIBUTION OF FUND	TYPE OF REVIEW — CONSTITUTIONAL, STATUTORY, OR OTHER	AGENCY REVIEWED
MISSOURI INSURANCE RATES LITIGATION (Involving insurance rates in state of Missouri) (1) 38 F. Supp. 986 (2) 129 F. 2d. 143 (3) 28 F. Supp. 601 (4) 39 F. Supp. 189 (5) 128 F. 2d 676 (6) 317 U. S. 412, 87 L. Ed. 368	$10,000,000.00	13	317 U. S. 412, 414, 87 L. Ed. 368, 370 128 F. 2d 676, 679 129 F. 2d 143, 144-145	Constitutional (XIVth Amendment, Due Process) 317 U. S. 412, 413-414, 87 L. Ed. 368, 370 128 F. 2d 676, 686	Department of Insurance of Missouri
OKLAHOMA v. TEXAS LITIGATION (Involving valuable oil deposits and lands) (1) 143 U. S. 621, 36 L. Ed. 285 (1892) (2) 161 U. S. 1, 40 L. Ed. 867 (3) 252 U. S. 372, 64 L. Ed. 619 (4) 256 U. S. 602, 65 L. Ed. 1114 (5) 258 U. S. 574, 66 L. Ed. 771 (6) 259 U. S. 565, 66 L. Ed. 1067 (7) 261 U. S. 340, 67 L. Ed. 687 (8) 261 U. S. 345, 67 L. Ed. 689 (9) 268 U. S. 252, 69 L. Ed. 937 (1925) (10) 256 U. S. 70, 65 L. Ed. 831 (11) 257 U. S. 308, 66 L. Ed. 252 (12) 260 U. S. 606, 67 L. Ed. 428 (13) 257 U. S. 609, 66 L. Ed. 395	Production of several hundred oil wells	34	252 U. S. 372, 64 L. Ed. 619 258 U. S. 574, 581 66 L. Ed. 771, 774	Constitutional (Art. III, Sec. 2, Original jurisdiction of Supreme Court of suit by or against states). 134 U. S. 621, 36 L. Ed. 285 256 U. S. 70, 81, 65 L. Ed. 831, 832	Congress of the United States

LITIGATION AND CITATIONS	AMOUNT OF FUND IN CUSTODY OF COURT	NUMBER OF YEARS IN LITIGATION	CITATIONS OF APPELLATE OR SUPREME COURT APPROVAL OF DEPOSIT OR DISTRIBUTION OF FUND	TYPE OF REVIEW — CONSTITUTIONAL, STATUTORY, OR OTHER	AGENCY REVIEWED
MAGNOLIA OIL CO. LITIGATION (Involving conflicting claims to rich oil deposits) (1) 106 F. 2d 217 (1939) (2) 309 U. S. 478, 84 L. Ed. 876 (3) 120 F. 2d 831 (4) 314 U. S. 658, 86 L. Ed. 528	Proceeds of oil production from railroad right of way across "rich" oil field, impounded by bankruptcy court.	5	309 U. S. 478, 482 84 L. Ed. 876, 880	Statutory	Federal Bankruptcy Court
COL. GREEN INHERITANCE TAX LITIGATION (Involving death taxes of $37,727,213.00 claimed by four states) (1) 300 U. S. 643, 81 L. Ed. 857 March 15th, 1937 (Motion of Texas to file original bill in the nature of interpleader case against Florida, New York, Mass., and widow and sister of decedent) (2) 81 L. Ed. 1335, 301 U. S. 671, (Appointment of Special Master by Supreme Court) (3) 82 L. Ed. 511, 302 U. S. 662 (Widow dismissed from action) (4) 83 L. Ed. 817, 306 U. S. 398 (Interpleader Jurisdiction decided) LEADING CASE ON INHERENT INTERPLEADER JURISDICTION OF COURTS OF EQUITY, UNDER BILLS IN THE NATURE OF INTERPLEADER. (5) 83 L. Ed. 1495, 307 U. S. 612 (May 15th, 1939) (Compensation and expenses of Special Master determined)	Gross estate: $44,348,500.00	3	306 U. S. 398, 405-412 83 L. Ed. 817, 824-828	Constitutional (Original jurisdiction, Supreme Court, Article III, Par. 2)	States of Florida, New York, Texas and Massachusetts

NOTE: Information above listed is as disclosed by tracing each case through repeated appeals and reported opinions. The table is merely of leading cases and does not purport to be all inclusive.

constitutional or other equitable grounds, sometimes on statutory review under applicable statutes.

The Administrative Procedure Act of course furnishes the broadest possible stay authority to the Court in every type of judicial review of administrative action.

Yet, in 1952, the Court of Appeals ordered dismissal of the actions and would nullify the final judgments, made by the District Court to preserve and protect the public interest and the savings deposits and titles of the homes of the more than 24,000 of Association depositors and borrowers.

The opinions of the Court of Appeals deny all Federal Courts any power by injunction, stay, interpleader, or otherwise, to preserve and protect the public interest and the litigants' rights, pending final termination of administrative proceedings.

Administrative power, by this holding, emasculates and nullifies judicial process.

Seizing officials thus hold the keys to the doors of the courts. Until they permit, no litigant can obtain from any Court, stay of enforcement of the administrative seizures. All of the equity powers, traditionally exercised by reviewing courts to preserve the public interest and the status and rights of the litigants, pending judicial review, are thus wholly subjected to administrative authority. Unless administrative authority condescends, all courts are helpless. Such holding is repugnant to the Constitution, due process of law, the Administrative Procedure Act, and the inherent authority of all courts.

Cases supporting payment into the Court have been previously cited.

In *United States v. Morgan* (1939), 307 U. S. 183, 198, 83 L. Ed. 1211, 1221, the Supreme Court ordered continued payments into Court pending *future* judicial review of the *future* administrative orders, which might result from further administrative hearings and stated:

> ". . . justice equally requires the court to await the outcome of the proceedings in order that it may discharge THE DUTY WHICH IT OWES TO THE LITIGANTS AND THE PUBLIC by avoiding unlawful disposition of the fund in the meantime, and ultimately distributing it to those found to be entitled to it. . . ." (Quoting many authorities.) (Emphasis added.)

See also *Federal Power Comm. v. Interstate, etc., Gas,* (1949), 336 U. S. 577, 93 L. Ed. 895, wherein the Court said at page 579 of the U. S.:

> "This case, here on certiorari, involves the proper disposition of a fund accumulated under a stay order issued by the Court . . . pending review . . .
>
> "Interstate deposited in the registry of the court pending review the monthly difference between payments under existing rates and those required under the order of the Commission. . . .
>
> ". . .
>
> "The basis of the claim stated in their petitions for intervention is that they are entitled to the fund as of right, since it was created by their payments. . . .
>
> ". . . it is the duty of the court to look beyond those companies for the rightful claimants of the fund . . .
>
> ". . . When a federal court of equity grants relief by way of injunction it has a responsibility to

protect all the interests whom its injunction may affect. . . . It assumes the duty to make disposition of the fund in accord with equitable principles. . . ."

Also *Inland Steel Company v. U. S.* (1939), 306 U. S. 153, 83 L. Ed. 557, wherein the Court said at page 158 of the U. S.:

"An equity court having lawful control of a fund, in which there may be interests represented only by a duly authorized governmental agency, has the power and is charged with the duty of protecting those interests in disposing of the fund. Otherwise, rights (such as the right of this Railroad to restitution) might be impaired or cut off while an interlocutory injunction is in effect, AS FOR INSTANCE BY STATUTES OF LIMITATION. Here, the court had the power and it was its duty so to fashion its equitable decree that appellant should not be the beneficiary of unlawful payments, and to prevent the dissipation of the Railroad's assets through unlawful preferences." (Emphasis added.)

See also:

Far East Conference v. United States (decided March 10, 1952), 342 U. S. 570, 96 L. Ed. 576;

Thompson v. Texas Mexican R. R. Co. (1947), 328 U. S. 134, 90 L. Ed. 1132;

General Amer. T. Car Corp. v. El Dorado, etc., (1940), 308 U. S. 422, 84 L. Ed. 361;

Order of Railway Conductors v. Pitney (1946), 326 U. S. 561, 90 L. Ed. 319;

United States of America v. I. C. C. (1949), 337 U. S. 426, 93 L. Ed. 1451.

The Court of Appeals' opinions hold the seizures of Long Beach Federal Savings and Loan Association to be

subject to Court review and the Administrative Procedure Act (Opin. in Apl. No. 12511, 196 F. 2d 336 at 375, 383, 382), but orders reversed, as beyond the power of the Court, all Court orders to preserve the public interest pending such review.

The opinion also holds the District Court wholly without authority to accept deposits into Court in interpleader, or otherwise, of disputed money, securities, notes, titles, and property.

The disputes were caused by the administrative orders and seizures. Decision of such disputes could be made only by court review or enforcement of the contested administrative orders.

The powers of courts of equity under these circumstances are extremely broad. Such powers include:

(a) The traditional power of stay (or injunction) of all appellate or reviewing courts;

(b) The statutory stay (or injunction) power under the Administrative Procedure Act, or other statutory review;

(c) Equity interpleader powers,

(1) Statutory interpleader, Title 28, U. S. C., Section 41(26), (1946 edition), Title 28, U. S. C., Sections 1335, 1397, and 2361 (1948 edition).

(2) Under Rule 22, Federal Rules of Civil Procedure, Interpleader.

(3) Inherent equity interpleader powers of all United States Courts, regardless of statutes or rules.

(d) Powers of courts to accept deposit of disputed money or property pending decision of such disputes.

During this litigation, repeated deposits have been made in court under one or more of the above powers of the District Court. [R. 86-100, 3461-3491, 3872-3875, 8138-8140, 6473-6486, 6920-6935, 8268-8270, 8287-8293, 8399-8529, Apl. 12511.]

Such deposits have been made during the course of the litigation, pending review or enforcement of various administrative orders. Other deposits were made subsequent to final administrative orders, which necessitated additional pleadings and deposits.

The Court of Appeals' opinions repudiate all powers of the court of equity to make any order, or grant any relief to protect the public interest until "appropriate conclusion" of the entire administrative process.

THOUSANDS OF BORROWERS, IN NO WAY CONCERNED IN THE ADMINISTRATIVE PROCESS, AND HAVING NO INTEREST IN ITS OUTCOME, ARE DENIED THE RIGHT TO PAY INTO COURT THE DEBT THEY ADMIT OWING, AND TO SECURE IMMEDIATE COURT DISCHARGE.

By the holding of the Court of Appeals, all such debtors are compelled, at their peril, to:

1. Refuse to pay any of the conflicting claimants, and be exposed to foreclosure, or

2. Speculate the outcome of seven years, or more, of litigation, and pay one claimant to the exclusion of others, at the peril of paying the same debt twice or more, if the wrong claimant be paid before final decision of the courts.

The District Court acted first and immediately, to preserve and protect the public interest, by freeing the

innocent homeowners of the burdens of the litigation. But the savings depositors, who, through their Shareholders' Protective Committee, were suing to recover their seized savings, equally required protection, protection accorded them by requiring deposit into the District Court of the money representing their seized savings.

Only the seizing Government officials have resisted the authority of the Court to protect the public interest,[7] an authority recognized by repeated Supreme Court decisions, both Federal and State.

The resistance by seizing Government officials of the authority of the courts to protect and preserve the public interest has carried this case repeatedly to every existing Federal Court,[8]—the United States Supreme Court in 1946-1947, the Court of Appeals for the Ninth Circuit in 1947-1948, and the District Court from 1946 until 1953.

The authority of the District Court to accept deposits into the registry to protect and preserve both the public and the litigants was upheld.

The judgments requiring deposit into court became final.

The $14,000,000.00 in assets has been in court for from 5 to 7 years. The judgments quieting the homeowners' titles, based upon such interpleader deposits in court, are now 5 years or more final from lack of appeal [R. 8287-8293, 8534, 8399-8525, 2393, 2519, 2561, 3136, Apl. 12511], or from previous appeals taken [R.

---

[7]Of the 23 appeals and writs, all were taken by respondents, Government officials.

[8]See Appendix pages 49-51 for List of Litigation for 23 separate court proceedings, trial and appellate.

3152, 2440, Apl. 12511] and dismissed [R. 3976-3978, 3550-3552, Apl. 12511], and from stays and writs denied by the Supreme Court in 1947 [R. 2302-2304, Apl. 12511], and by the Court of Appeals in 1947 and 1950. (See Appx. pp. 47-48.)

(b) Jurisdiction of Cross-Claims and Counterclaims Is Not Dependent Upon Jurisdiction of the Original Complaint.

Petitioner Title Service Company was among the first interpleaders in the original actions in June of 1946. [R. 43-56, Apl. 12511.] (The action was commenced May 27, 1946.) It interpled both real and personal property. The real property was the titles to the homes of 8,000 borrowers, held as security for several thousand loans aggregating $12,000,000.00. The personal property was the original notes and deeds of trust, at first several hundred in number, aggregating $800,000.00 [R. 523-533, Apl. 12511] and by supplemental interpleaders the balance of the original notes and trust deeds came into court. [R. 8288-8293, Apl. 12511.] (See Appx. p. 40.)

This interpleader was entirely independent of any jurisdiction or lack of the same in the original proceeding in the District Court. Independent cross-claims in interpleader or otherwise, are in no way dependent upon the jurisdiction of the original proceedings.

Cases so holding are:

Vidal v. South American Securities Co., 276 Fed. 855 (C. C. A.-2—1922);

Barber Asphalt Corp. v. La Fera, Etc., 116 F. 2d 211 (C. C. A.-3—1940);

Lion Mfg. Corp. v. Chicago Flexible Etc., 106 F. 2d 930 (C. C. A.-7—1939).

Railway Express v. Jones, 106 F. 2d 341 (C. C. A.-7—1939);

Isenberg v. Biddle, 125 F. 2d 741 (C. C. A.—D. C. —1941);

San Diego Flume Co. v. Souther (C. C. A. 9—1898), 90 Fed. 164;

Public Service Commission of the State of Missouri v. Brashear Freight Lines, Inc., 312 U. S. 621, 85 L. Ed. 1083—(1941);

Sunflower Oil Company v. Wilson, 142 U. S. 313, 35 L. Ed. 1025,—(1892).

(c) The Court Has Power to Instruct a Trustee Sued by Conflicting Claimants.

A trustee confronted by multiple conflicting claims is not required to himself decide at his own peril the validity or sufficiency of any of the claims. This is so even if the claims have proceeded to the point of one or more suits by the claimants against the trustee.

There is but one trust estate which can justly belong to only one of the claimants. If, as often happens, the trustee is compelled to defend two, or more, separate law suits by each of the two or more claimants, the trustee is not required to run the risk of a race by the claimants as to which shall first obtain judgment. Nor must the trustee be imperiled by the possibility of two, or more, judgments, one ordering him to convey the trust estate to one claimant, another ordering him to convey the same trust estate to another claimant.

Such manifest injustice gave rise to the equitable remedy of interpleader. The trustee having but a single

trust estate can interplead such trust estate into the equity court which compelled the conflicting claimants, only one of whom could justly be entitled to the interpled property, to litigate their claims exclusively in the court in which the contested property was on deposit.

An injunction against the other actions, at law or otherwise, by the claimants against the trustee, has been traditional for centuries. Interpleader was always available prior to completion of the actions at law. Interpleader could be invoked prior to, or at any stage of, the legal proceedings.

Existence of an administrative hearing, available only to some or all of the claimants, cannot nullify the trustee's right to interpleader. Final decision either by administrative hearing or court review or a combination of one or both, of necessity, consumes a period of years.

The trust estate was real property, the homes of borrowers. The trustee could neither accept the demands of any one of the claimants and convey the titles to the homes, nor could it refuse all conveyances pending administrative and/or court decision of the validity and merits of conflicting claims.

If the trustee itself decided the merits of the claims, it usurped the function of the courts at the trustee's own peril.

If the trustee conveyed at the demand of a claimant who years later was defeated, the trustee was personally liable to the successful claimant. If the trustee refused to convey pending final determination of the merits of the conflicting claims, the trustee was equally personally liable for refusal of a conveyance to the claimant who later was successful. Nearly seven years have passed

in this case and who will eventually be successful is not yet known.

In *Mosser v. Darrow* (1951), 341 U. S. 267, 95 L. Ed. 927, the Supreme Court imposed personal liability upon a trustee for failure to obtain instructions of a court in the conduct of the trust estate. The United States Supreme Court said at page 274 of the U. S.:

> ". . . But a trusteeship is serious business and is not to be undertaken lightly or so discharged. The most effective sanction for good administration is personal liability for the consequences of forbidden acts, and there are ways by which a trustee may effectively protect himself against personal liability.
>
> "The practice is well established by which trustees seek instructions from the court, given upon notice to creditors and interested parties, as to matters which involve difficult questions of judgment . . ."

In *Redmond v. Commerce Trust Co.* (C. C. A.-8, 1944), 144 F. 2d 140 (Certiorari denied, U. S. Supreme Court, 323 U. S. 776, 89 L. Ed. 620).

The Court of Appeals, in discussing power of trustee to obtain instructions of a court of equity in the conduct of a trust estate, said at page 154:

> "(8) There can be no doubt of the power and the right of Commerce [trustee] to seek the instructions of a proper court of equity as to the two above matters. While it might have put its own construction upon the indenture and gone ahead in reliance thereon, yet it would have proceeded at its peril and would have been liable to interested parties injured by a misconstruction. It was not compelled to take this risk. Where a change in the character of the trust fund is involved, it is always safer for a trustee to act under court instruction . . ."

(d) Payment Into the Registry of the Court in Interpleader Is Final, and the Judgments in Interpleader Are Res Judicata.

Approximately $14,000,000.00 of disputed money, notes, trust deeds, and securities, were paid by, or on behalf of, homeowners into the registry of the District Court, pursuant to final judgments accepting such deposits in interpleader,—there to await court decision of the disputed and conflicting claims of the litigants. [R. 8268-8270, 8287-8293, 8399-8529, Apl. 12511.]

The effect of such payment to discharge the debt, AT THE TIME OF THE PAYMENT INTO COURT, is announced in *Dugas v. American Surety* (1937), 300 U. S. 414, 81 L. Ed. 720, wherein the Court said:

> "In the interpleader suit there was an actual, complete and judicially sanctioned payment . . . While the payment was into the court's registry, and not directly to the claimants, it nevertheless was a lawful and efective payment under the Interpleader Act . . .
>
> ". . . No appeal was taken from either decree. Therefore Dugas was bound by both decrees . . . these rulings were . . . subject to challenge and re-examination ONLY ON APPEAL, and became conclusive on him in the absence of an appeal." (Emphasis added.)

The statute under which the Court acts, reads in part:

> "Sec. 3 Said court shall hear and determine the cause and shall discharge the complainant from further liability; and shall make the injunction permanent and enter all such other orders and decrees as may be suitable and proper, and issue all such customary writs as may be necessary or convenient to carry out and enforce the same." (Title 28, U. S. C., Sec. 41(26), 1946 edition.)

This section of the Judicial Code, Title 28, is expressly cited and approved by the United States Supreme Court in *Dugas v. American Surety, supra,* and in *Treinies v. Sunshine Mining Co.* (1940), 308 U. S. 66, 84 L. Ed. 85.

See also:

Stoll v. Gottlieb (1938), 305 U. S. 165, 83 L. Ed. 104.

Conclusion.

For the foregoing reasons, it is respectfully submitted that a writ of certiorari by the United States Supreme Court is urgently required:

1. To preserve the integrity of final judgments of the United States Courts, based upon mandates from the Supreme Court;

2. To preserve the power of the United States Courts to protect the public interest against unconstitutional, arbitrary, and confiscatory seizures of savings deposits and homes, by wanton, wilfull, and malicious abuse of administrative authority;

3. To preserve the power of the United States Courts to protect the public interest and the rights of litigants by stay of enforcement of *ex parte* administrative seizures, pending judicial review thereof.

Respectfully submitted,

FREDERIC A. SHAFFER,
LYMAN B. SUTTER,

Attorneys for Petitioner Title Service Company, Trustee on Deeds of Trust of 8,000 Homeowners.

Appendix Reference.

To prevent repetition in the several petitions for certiorari, a combined appendix by certain petitioners is filed herewith, bound as a separate volume. All appendix references in this petition are to such bound appendix.

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FILED
FEB 9 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1952

No. 591-596

MALLONEE, *et al.*,

Petitioners,

vs.

FAHEY, *et al.*,

Respondents.

COMBINED APPENDIX TO CERTIORARI PETITIONS OF CERTAIN PETITIONERS.

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INDEX TO APPENDIX

PAGE

A. Applicable statutes 1

1. Portions of Administrative Procedure Act..... 1

(a) Sec. 1009. Judicial review of agency action..... 1

2. Portions of the Federal Home Loan Bank Act..... 4

(a) Sec. 1423. Federal Home Loan Banks..... 4

(b) Sec. 1426. Capital of Federal Home Loan Banks and subscriptions thereto..... 4

(c) Sec. 1432. Incorporation of banks, and corporate powers 8

(d) Sec. 1445 9

(e) Sec. 1446 9

3. Portions of the Home Owners' Loan Act of 1933..... 10

(a) Sec. 1464. Federal Savings and Loan Associations 10

4. Portions of the National Housing Act..... 13

(a) Sec. 1725. Creation of Federal Savings and Loan Insurance Corporation 13

(b) Sec. 1726. Insurance of accounts and eligibility provisions 14

5. Portions of the Judicial Code..... 14

(a) Sec. 41. The District Courts shall have original jurisdiction as follows..... 14

(b) Sec. 118. Absent defendants in suits to enforce liens 17

PAGE

B. General 19

1. Extracts from hearings before a Special Subcommittee of the Committee on Expenditures in Executive Departments, House of Representatives, Eighty-first Congress, Second Session, Investigation of the Home Loan Bank Board 19

(a) Respondents refuse demanded administrative hearing 19

(b) Anonymous letter as basis for seizure of Federal Home Loan Bank..... 22

2. Federal Savings and Loan Insurance Corporation pleads statutes of limitations against depositors' suit to enforce insurance of savings deposits..... 24

3. Administrative orders for first seizure, rescission of second seizure, and threatened third seizure..... 26

4. District Court findings concerning homeowners' tangled titles, and specimen of notes seized, and assignments made, by respondent conservator..... 40

5. Orders of Court of Appeals denying writs of prohibition against District Court in 1950..... 47

6. List of litigation..... 49

7. Order appointing receiver for preservation of $14,000,000.00 of notes and security on deposit with District Court against expiration of statute of limitations.... 52

8. Order for interim allowance of costs and expenses to to defend appeal from order appointing receiver..... 75

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A. APPLICABLE STATUTES.

1. Portions of Administrative Procedure Act. Title 5, U. S. C. A.

(a) Sec. 1009: Judicial Review of Agency Action.

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review.

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings.

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable.

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Relief pending review.

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such con-

ditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of review.

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, §10, 60 Stat. 243.

2. Portions of the Federal Home Loan Bank Act. Title 12, U. S. C. A.

(a) Sec. 1423: Federal Home Loan Banks.

Sec. 3. As soon as practicable the board shall divide the continental United States, Puerto Rico, the Virgin Islands, and the Territories of Alaska and Hawaii into not less than eight nor more than twelve districts. Such districts shall be apportioned with due regard to the convenience and customary course of business of the institutions eligible to and likely to subscribe for stock of a Federal Home Loan Bank to be formed under this Act, but no such district shall contain a fractional part of any State. The districts thus created may be readjusted and new districts may from time to time be created by the board, not to exceed twelve in all. Such districts shall be known as Federal Home Loan Bank districts and may be designated by number. As soon as practicable the board shall establish, in each district, a Federal Home Loan Bank at such city as may be designated by the board. Its title shall include the name of the city at which it is established. (July 22, 1932, c. 522, Sec. 3, 47 Stat. 726.)

(b) Sec. 1426: Capital of Federal Home Loan Banks and Subscriptions Thereto.

Sec. 6. (a) As soon as practicable after the enactment of this Act, the board, with the approval of the Secretary of the Treasury, shall determine the minimum capital of each Federal Home Loan Bank which shall be not less than $5,000,000. The board shall, as soon as practicable thereafter, open books in each district established under section 3 for subscription to the capital stock of the Federal Home Loan Bank of the district.

(b) The capital stock of each Federal Home Loan Bank shall be divided into shares of a par value of $100 each. The minimum capital stock shall be issued at par. Stock issued thereafter shall be issued at such price not less than par as may be fixed by the board.

. . .

(g) After the amount of capital of a Federal Home Loan Bank paid in by members equals the amount paid in by the Secretary of the Treasury under subsection (f), such bank shall apply annually to the payment and retirement of the shares of the capital stock held by the United States, 50 per centum of all sums thereafter paid in as capital until all such capital stock held by the United States is retired at par. Stock held by the United States may at any time, in the discretion of the Federal Home Loan Bank, and with the approval of the board, be paid off at par and retired in whole or in part; and the board may at any time require such stock to be paid off at par and retired in whole or in part if in the opinion of the board the Federal Home Loan Bank has resources available therefor: *Provided,* That accumulated dividends, as provided in subsection (k), have been paid.

. . .

(i) Any member may withdraw from membership in a Federal Home Loan Bank six months after filing with the board written notice of intention so to do, and THE BOARD MAY, AFTER HEARING, REMOVE ANY MEMBER FROM MEMBERSHIP, or deprive any nonmember borrower of the privilege of obtaining further advances, IF, IN THE OPINION OF THE BOARD, SUCH MEMBER OR NONMEMBER BORROWER HAS FAILED TO COMPLY WITH ANY PROVISIONS OF THIS ACT OR THE REGULATIONS OF THE

BOARD MADE PURSUANT THERETO OR IF, IN THE OPINION OF THE BOARD, SUCH MEMBER OR NONMEMBER BORROWER IS INSOLVENT. In any such case, the indebtedness of such member or nonmember borrower to the Federal Home Loan Bank shall be liquidated, and the capital stock in the Federal Home Loan Bank owned by such member shall be surrendered and canceled. Upon the liquidation of such indebtedness such member or nonmember borrower shall be entitled to the return of its collateral, and upon surrender and cancellation of such capital stock, the member shall receive a sum equal to its cash paid subscriptions for the capital stock surrendered, except that if at any time the board finds that the paid-in capital of a Federal Home Loan Bank is or is likely to be impaired as a result of losses in or depreciation of the assets held, the Federal Home Loan Bank shall on the order of the board withhold from the amount to be paid in retirement of the stock a pro rata share of the amount of such impairment as determined by the board.

. . .

(k) All stock of any Federal Home Loan Bank shall share in dividend distributions without preference.[7]

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[7]As amended by sec. 2 of An Act to Provide Additional Home-Mortgage Relief (49 Stat. 293, 12 U. S. C. 1426(k). Sec. 6(k) of the Federal Home Loan Bank Act (47 Stat. 729, 12 U. S. C. 1426) formerly read as follows:

"All stock of any Federal Home Loan Bank shall share in dividend distributions without preference, except that stock subscribed for by the United States shall be entitled to dividends at a rate of 2 per centum per annum cumulative from the date of investment but in any case in which the rate of dividend is in excess of 2 per centum, the stock subscribed for by the United States shall be entitled to dividends at a rate not in excess of that paid on other stock."

(July 22, 1932, c. 522, Sec. 6, 47 Stat. 727; June 27, 1934, c. 847, Sec. 509, 48 Stat. 1264; May 28, 1935, c. 150, Sec. 2, 49 Stat. 293.)

(1) Within one year after June 27, 1950, each member of each Federal Home Loan Bank shall acquire and hold and thereafter maintain its stock holding in an amount equal to at least 2 per centum of the aggregate of the unpaid principal of such member's home mortgage loans, home-purchase contracts, and similar obligations, but not less than $500. Such stock in excess of the amount hereby required may be purchased from time to time by members and may be retired from time to time as heretofore. One year after June 27, 1950, each Federal Home Loan Bank shall retire and pay off at par an amount of its stock held by the Secretary of the Treasury equivalent to the amount of its stock held by its members in excess of the amount required to be held by them by the first two sentences of subsection (c) of this section immediately prior to June 27, 1950, and annually thereafter each Federal Home Loan Bank shall retire an amount of such Government stock equivalent to 50 per centum of the net increase of its stock held by members since the last previous retirement: *Provided*, That none of such Government capital shall at any time be retired so as to reduce the aggregate capital stock, reserves, surplus, and undivided profits of the Federal Home Loan Banks to less than $200,000,000: *Provided Further*, That notwithstanding any provision of this subsection, nothing in this subsection shall limit or affect the operation of subsection

(g) of this section. (As amended June 27, 1950, c. 369, Sec. 2, 64 Stat. 257.)

(c) Sec. 1432: Incorporation of Banks, and Corporate Powers.

Sec. 12. The directors of each Federal Home Loan Bank shall, in accordance with such rules and regulations as the board may prescribe, make and file with the board at the earliest practicable date after the establishment of such bank, an organization certificate which shall contain such information as the board may require. Upon the making and filing of such organization certificate with the board, such bank shall become, as of the date of the execution of its organization certificate, a body corporate, and as such and in its name as designated by the board it shall have power to adopt, alter, and use a corporate seal; to make contracts, to purchase or lease and hold or dispose of such real estate as may be necessary or convenient for the transaction of its business, but no bank building shall be bought or erected to house any such bank, nor shall any such bank make any lease for such purpose which has a term of more than ten years; TO SUE AND BE SUED, TO COMPLAIN, AND TO DEFEND, IN ANY COURT OF COMPETENT JURISDICTION, STATE OR FEDERAL; to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transaction of its business, subject to the approval of the board; to define their duties, require bonds of them and fix the penalties thereof, and to dismiss at pleasure such officers, employees, attorneys, and agents; and, by its board of directors, to prescribe, amend, and

repeal by-laws, rules, and regulations governing the manner in which its affairs may be administered; and the powers granted to it by law may be exercised and enjoyed subject to the approval of the board. The president of a Federal Home Loan Bank may also be a member of the board of directors thereof, but no other officer, employee, attorney, or agent of such bank, who receives compensation, may be a member of the board of directors. EACH SUCH BANK SHALL HAVE ALL SUCH INCIDENTAL POWERS, NOT INCONSISTENT WITH THE PROVISIONS OF THIS ACT, AS ARE CUSTOMARY AND USUAL IN CORPORATIONS GENERALLY. (July 22, 1932, c. 522, Sec. 12, 47 Stat. 735.) (Emphasis added.)

(d) Sec. 1445.

Sec. 25. Each Federal Home Loan Bank shall have succession until dissolved by the board under this Act or by further Act of Congress. (July 22, 1932, c. 522, Sec. 25, 47 Stat. 740.)

(e) Sec. 1446.

Sec. 26. Whenever the board finds that the efficient and economical accomplishment of the purposes of this Act will be aided by such action, and in accordance with such rules, regulations, and orders as the board may prescribe, any Federal Home Loan Bank may be liquidated or reorganized, and its stock paid off and retired in whole or in part in connection therewith after paying or making provision for the payment of its liabilities. In the case of any such liquidation or reorganization, any other Federal Home Loan Bank may, with the approval of the board, acquire assets of any such liquidated or reorganized bank and assume liabilities thereof, in whole or in part. (July 22, 1932, c. 522, Sec. 26, 47 Stat. 740.)

3. Portions of the Home Owners' Loan Act of 1933. Title 12, U. S. C. A.

(a) Sec. 1464: Federal Savings and Loan Associations.

Sec. 5. (a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations," and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

(b) Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board.

(c) Such associations shall lend their funds only on the security of their shares or on the security of first liens upon homes or combination of homes and business property within fifty miles of their home office: *Provided*, That not more than $20,000 shall be loaned on the security of a first lien upon any one such property; except that not exceeding 15 per centum of the assets of such association may be loaned on other improved real estate

without regard to said $20,000 limitation, and without regard to said fifty-mile limit, but secured by first lien thereon: *And provided further,* That any portion of the assets of such associations may be invested in obligations of the United States or the stock or bonds of a Federal Home Loan Bank: *And provided further,* That any such association which is converted from a State-chartered institution may continue to make loans in the territory in which it made loans while operating under State charter.[18]

(Added by 1950 Supp. to (c)):

Notwithstanding any other provision of this subsection except the area restriction such associations may invest their funds in loans insured under sections 1702, 1703, 1705 and 1706, and 1706b of this title, loans guaranteed or insured as provided in sections 693-697g of Title 38 (except business loans provided by section 694c of Title 38 and not secured by a lien on real estate), or in other loans for property alteration, repair, or improvement: *Provided,* That no such loan shall be made in excess of $1,500 except in conformity to the other provisions of this subsection, and that the total amount of loans so made without regard to the other provisions of this subsection shall not, at any time, exceed 15 per centum of the association's assets.

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[18]Sec. 18 of An Act to Provide Additional Home-Mortgage Relief (49 Stat. 297, 12 U. S. C. 1464) amended sec. 5(c) of the Home Owners' Loan Act of 1933 (48 Stat. 132, 12 U. S. C. 1464) by striking out the period after the word "Bank" and inserting in lieu thereof a colon and the phrase above set forth in the text.

(d) The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation.

(e) No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions.

(f) Each such association, upon its incorporation, shall become automatically a member of the Federal Home Loan Bank of the district in which it is located, or if convenience shall require and the Board approve, shall become a member of a Federal Home Loan Bank of an adjoining district. Such associations shall qualify for such membership in the manner provided in the Federal Home Loan Bank Act with resepect to other members.

. . .

4. Portions of the National Housing Act. Title 12, U. S. C. A.

(a) Sec. 1725: Creation of Federal Savings and Loan Insurance Corporation.

Sec. 402. (a) There is hereby created a Federal Savings and Loan Insurance Corporation (hereinafter referred to as the "Corporation"), which shall insure the accounts of institutions eligible for insurance as hereinafter provided, and shall be under the direction of a board of trustees to be composed of five members and operated by it under such bylaws, rules, and regulations as it may prescribe for carrying out the purposes of this title. The members of the Federal Home Loan Bank Board shall constitute the board of trustees of the Corporation and shall serve as such without additional compensation. The principal office of the Corporation shall be in the District of Columbia.

. . .

(c) Upon the date of enactment of this Act, the Corporation shall become a body corporate, and shall be an instrumentality of the United States, and as such shall have power—

(1) To adopt and use a corporate seal.

(2) To have succession until dissolved by Act of Congress.

(3) To make contracts.

(4) To SUE ANE BE SUED, COMPLAIN AND DEFEND, IN ANY COURT OF LAW OR EQUITY, STATE OR FEDERAL.

(Emphasis added.)

. . .

(b) Sec. 1726: Insurance of Accounts and Eligibility Provisions.

Sec. 403. (a) It shall be the duty of the Corporation to insure the accounts of all Federal savings and loan associations, and it may insure the accounts of building and loan, savings and loan, and homestead associations and cooperative banks organized and operated according to the laws of the State, District, or Territory in which they are chartered or organized.

5. Portions of the Judicial Code. Title 28, U. S. C.

(a) Sec. 41: The District Courts Shall Have Original Jurisdiction as Follows:

. . .

(26) *Original jurisdiction of bills of interpleader, and of bills in the nature of interpleader.*

(a) Of suits in equity begun by bills of interpleader or bills in the nature of bills of interpleader duly verified, filed by any person, firm, corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of the value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if—

(i) Two or more adverse claimants, citizens of different States, are claiming to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy, or other instrument, or arising by virtue of any such obligation; and

(ii) The complainant (a) has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court; or (b) has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the complainant with the future order or decree of the court with respect to the subject matter of the controversy.

Such a suit in equity may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

(b) Such a suit may be brought in the district court of the district in which one or more of such claimants resides or reside.

(c) Notwithstanding any provision of Part I of this title to the contrary, said court shall have power to issue its process for all such claimants and to issue an order of injunction against each of them, enjoining them from instituting or prosecuting any suit or proceeding in any

State court or in any United States court on account of such money or property or on such instrument or obligation until the further order of the court; which process and order of injunction shall be returnable at such time as the said court or a judge thereof shall determine and shall be addressed to and served by the United States marshals for the respective districts wherein said claimants reside or may be found.

(d) Said court shall hear and determine the cause and shall discharge the complainant from further liability; and shall make the injunction permanent and enter all such other orders and decrees as may be necessary or convenient to carry out and enforce the same.

(e) In any action at law in a United States District Court against any person, firm, corporation, association, or society, such defendant may set up by way of equitable defense, in accordance with section 398 of this title, any matter which would entitle such person, firm, corporation, association, or society to file an original or ancillary bill of interpleader or bill in the nature of interpleader in the same court or in any other United States District Court against the plaintiff in such action at law and one or more other adverse claimants, under the provisions of paragraph (a) of this subsection or any other provision of Part I of this title and the rules of court made pursuant thereto. The defendant may join as parties to such equitable defense any claimant or claimants who are not already parties to such action at law. The district court in which such equitable defense is interposed shall thereby

possess the powers conferred upon district courts by paragraphs (c) and (d) of this subsection and by section 398 of this title. (May 8, 1926, ch. 273, §§1-3, 44 Stat. 416; Jan. 20, 1936, ch. 13, §1, 49 Stat. 1096.)

(b) Sec. 118. Absent Defendants in Suits to Enforce Liens.

When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction,

and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State. Any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law. (Mar. 3, 1911, ch. 231, §57, 36 Stat. 1102.)

B. GENERAL.

1. **Extracts From: Hearings Before a Special Subcommittee of the Committee on Expenditures in Executive Departments House of Representatives, Eighty-first Congress, Second Session, Investigation of the Home Loan Bank Board.**

(a) Respondents Refuse Demanded Administrative Hearing.

(Pages 649-650 of Hearings Before a Special Subcommittee of the Committee on Expenditures in Executive Departments, House of Representatives, Eighty-First Congress, Second Session, Investigation of the Home Loan Bank Board.)

"NITE LETTER

January 20, (1948)

"SAMUEL DIVERS,

Chairman, Federal Home Loan Bank Board
Washington, D. C.

On behalf of minority shareholders of Long Beach Federal Savings and Loan Association, demand is hereby made that the administrative hearing provided by Section 206.2 of the Rules and Regulations for Federal Savings and Loan System be held at earliest convenience of the Board.

Charles T. Smith.

402 Jergins Trust Bldg.
Long Beach, California."

The reply of the Home Loan Bank Board thereto, was:

"WESTERN UNION

"Ta 86 WM 35

W.CP9 GOVT PD-CP WASHINGTON DC 23 1019A

1948 Jan 23 AM 753

Charles T. Smith, Linnell and Smith

401-2-3 Jergins Trust Bldg Long Beach Calif.

Under the Regulations hearing referred to in your telegram of January 20, is held at request of Associations Board of Directors. Due to recent developments it is our view that the request for such hearing is not now pending.

WILLIAM K. DIVERS

20. CHAIRMAN HOME LOAN BANK BOARD."

Thereafter, on January 20, 1948, the said attorney for said Long Beach shareholders wrote to appellant Home Loan Bank Board, in part, as follows:

". . . it is respectfully requested that the order made by the Federal Home Loan Bank Board on January 17, 1948, directing that the assets of said association be redelivered to the shareholders, be rescinded, and THAT PURSUANT TO SECTION 206.2 of the Rules and Regulations for the Federal Savings and Loan System, AN ADMINISTRATIVE HEARING BE HELD ON THIS MATTER." (Emphasis added.)

In reply thereto, the Home Loan Bank Board, on January 26, 1948, wrote in part:

". . . the United States District Court for the Southern District of California has entered an order which, prior to an election, would return the former officers and directors of the association under the supervision of a Master in Chancery. The court order also provides that the Master in Chancery is to supervise an election to determine the directors of the institution. Under such circumstances, it does not appear that a rescission by the Board of the resolution of January 17 would accomplish a change in the situation.

"Your letter also requests that pursuant to Section 206.2 of the Rules and Regulations of the Federal Savings and Loan System that an administrative hearing be held on this matter. As indicated in my reply to your telegram of several days ago, such hearings under the Regulations are held at the request of the association's directors and it is our view that such a request is not now pending.

Very truly yours,

(Signed) Wm. K. Divers
William K. Divers
Chairman."

Attachment.

(A copy of Home Loan Bank Board Order No. 388 removing the conservator and ordering him to account with the District Court was attached.)

(b) Anonymous Letter as Basis for Seizure of Federal Home Loan Bank.

(Pages 1807-1808 of Hearings Before a Special Subcommittee of the Committee on Expenditures in Executive Departments, House of Representatives, Eighty-First Congress, Second Session, Investigation of the Home Loan Bank Board.)

March 19, 1946

Confidential.

This morning I called Miss Kelly, Secretary to John W. Snyder, Director of War Mobilization and Reconversion, at the White House. I said I did not know whether Mr. Snyder was expecting me to see him today in response to the message which she telephoned on Thursday, March 14, relative to our Los Angeles and Portland banks. I was therefore calling so that I might plan to be available whenever he wished to see me. I explained that so far as I was concerned there was no hurry about the matter except that we had to make plans concerning the coast situation as soon as possible inasmuch as it was necessary to send someone out there and we were attempting to arrange for the end of this month.

She said that Mr. Snyder had his advisory committee meeting on today and he was engaged with the committee already and it was very likely he would be tied up until after 5 o'clock today. She added that she had the impression that his suggestion was that nothing be done until after Tuesday and that may have meant tomorrow (Wednesday, March 20).

She said that the forenoon meeting with the advisory committee would adjourn about 12 o'clock and she would speak to Mr. Snyder then relative to word from him on

a possible meeting tomorrow which would enable me to fix my engagements.

When I returned from the meeting with the representatives of the Research Institute of America at the Mayflower, which was also attended by Mr. Wyatt and Mr. Foley. At about 3:15 I was informed that Mr. Snyder had called and wished me to call back. I called him promptly when he said immediately that there was no occasion for any delay in the matter and I could "go straight ahead" with the plan I discussed with him. I asked if he had in mind writing me a letter on the subject and he said that he felt that was unnecessary; that I could go ahead on his assurance that it was all right. I said this would be most helpful because we could now go ahead with our plans as we were rather disturbed about various conditions which had come to our attention out there and felt that it was dangerous to delay. I asked him if he had had an opportunity to check the matter with the President and he said he had and that the President was completely behind us. I had just received an anonymous communication in the mail concerning California which I read to him over the telephone as an example of the kind of thing that was going on. Mr. Snyder was very definite in his attitude that we should act.

J. H. F.

(The anonymous communication referred to follows):

If you confirm our apparently reliable information by maliciously sending witchhunters to California before November, causing unjustified political embarrassments, a press campaign for congressional ouster proceedings and complete investigation of your entire administration will be promptly started.

2. Federal Savings and Loan Insurance Corporation Pleads Statute of Limitations Against Depositors Suit to Enforce Insurance of Savings Deposits.

Ernest A. Tolin
United States Attorney
Arline Martin
Assistant United States Attorney
600 Federal Building
Los Angeles, California
Telephone: MAdison 7411

In the District Court of the United States
In and for the Southern District of California
Central Division.

Paul Mallonee, *et al.*, Plaintiff, v. John H. Fahey, *et al.*, Defendants. Civil Action No. 5421-P.H.

ANSWER OF THE DEFENDANT FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION TO THE FIRST AMENDED AND SUPPLEMENTAL COMPLAINT, THE SUPPLEMENT TO THE FIRST AMENDED AND SUPPLEMENTAL COMPLAINT, THE AMENDED CROSS-CLAIM, THE SUPPLEMENTAL CROSS-CLAIM TO AMENDED CROSS-CLAIM, AND THE SECOND SUPPLEMENTAL CROSS-CLAIM UPON CONSERVATOR'S BOND AND AGAINST FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION.

Comes now the defendant Federal Savings and Loan Insurance Corporation and, without waiving its objections to the jurisdiction of this Court, and its other objections including objections to jurisdiction and venue, but specifically reserving and asserting the same, for its defense to the First Amended and Supplemental Complaint, Supplement to the First Amended and Supplemental Complaint, Amended Cross-Claim, Supplemental Cross-Claim to Amended Cross-Claim, and Second Supplemental Cross-

Claim upon Conservator's Bond and Against Federal Savings and Loan Insurance Corporation states:

. . .

SECOND DEFENSE

. . . Accordingly, the plaintiffs have been guilty of such laches as should in equity bar them from maintaining this action against this defendant, and this action against this defendant is barred by the statutes of limitations.

. . .

WHEREFORE, this defendant prays that the action against it be dismissed, that the First Amended and Supplemental Complaint, Supplement to the First Amended and Supplemental Complaint, Amended Cross-Claim, Supplemental Cross-Claim to Amended Cross-Claim, and Second Supplemental Cross-Claim upon Conservator's Bond and Against Federal Savings and Loan Insurance Corporation be stricken from the files, that all returns of service of process against this defendant be quashed, that this defendant recover its costs and disbursements herein, and for such other and further relief as may be proper in the premises.

Dated: June 4th, 1951.

ERNEST A. TOLIN
United States Attorney
ARLINE MARTIN
Assistant United States Attorney
By /s/ Arline Martin
Arline Martin
Assistant United States Attorney
Attorneys for Defendant Federal Savings and Loan Insurance Corporation.

3. Administrative Orders for First Seizure, Rescission of Second Seizure, and Threatened Third Seizure.

Federal Home Loan Bank Administration
(Bulletin 54)

PART 7—SUPERVISION RECORDS AND FILES.

Part 7 of the rules and regulations for the Federal Home Loan Bank System is hereby amended, effective as of March 25, 1946, by adding at the end thereof an adidtional section 7.3, reading as follows:

Sec. 7.3 Records of the Federal Home Loan Bank Administration—(a) In control of the Bank Administration. All records of the Federal Home Loan Bank Administration are in its custody and control for purposes relating to the powers, duties and authorities of the Federal Home Loan Bank Administration, under the provisions of the Federal Home Loan Bank Act, as amended, and the Home Owners' Loan Act of 1933, as amended. No officer or employee has any control over such records and no discretion with regard to permitting the use of them for any other purpose. All such officers and employees are hereby prohibited from giving out any official information obtained by any one of them on behalf of the Federal Home Loan Bank Administration, or any of such records, to any private person or to any local officer or to any court, including the production of such records or copies thereof made pursuant to their official duties, whether in answer to a subpoena *duces tecum* or otherwise. Whenever any such subpoena shall have been served upon any of them, they will appear in court in answer thereto, and respectfully decline to produce the records called for, on the ground of being prohibited therefrom by this part.

(b) In control of agents, etc. All records in the control of any person, including any of the Federal Home Loan Banks, the Federal Savings and Loan Corporation, or the Home Owners' Loan Corporation, in the capacity as agents of the Federal Home Loan Bank Administration, or in the hands of any officer or employee of the Federal Home Loan Bank Administration, must be considered deemed to be privileged and confidential, and such records are in their custody and control for purposes relating to the powers, duties and authorities of the Federal Home Loan Bank Administration under the provisions of the Federal Home Loan Bank Act, as amended, and the Home Owners' Loan Act of 1933, as amended. They have no control over them and no discretion with regard to permitting the use of them for any purpose. All such agents are hereby prohibited from giving out any official information obtained by any one of them on behalf of the Federal Home Loan Bank Administration, or any of such records to any private person or to any local officer or to any court, including the production of such records or copies thereof made pursuant to their official duties, whether in answer to a subpoena *duces tecum* or otherwise. Whenever any such subpoena shall have been served upon any of them, they will appear in court in answer thereto, and respectfully decline to produce the records called for, on the ground of being prohibited therefrom by this part.

(c) Confidential character. The giving out of any such records or information or documents relative thereto, by any of the persons hereinabove referred to, is held to be contrary to public policy by reason of its privileged and confidential character involving delicate and sensitive matters relating to the condition and affairs of financial

institutions, and not to be permitted. In all cases where any such documents or records, or copies thereof, are desired by, or on behalf of, any private party, or parties to a suit, whether in a court of the United States or any other, such information, or copies shall be furnished only upon the written authorization or approval of the Commissioner of the Federal Home Loan Bank Administration, or such person or persons as may be authorized by him to grant such authorization or approval.

(1 Stat. 28, 49, 65, 68, 553; 9 Stat. 395, sec. 8; 16 Stat. 163; 17 Stat. 283, sec. 8, 17; 47 Stat. 731, 736, sec. 5(a), (d); 48 Stat. 133, 233, sec. 403(b); 48 Stat. 1257, sec. 17(a); 49 Stat. 297, sec. 23; 49 Stat. 298; 5 U. S. C. 22, 12 U. S. C. and Sup., 1428, 1437, 1463(n), 1464(a), (d), 1726(b); E. O. 9070, 7 F. R. 1529.)

This amendment is deemed to be of a procedural character within the meaning of sec. 8.3 of the rules and regulations for the Federal Home Loan Bank System.

Dated: March 25, 1946.

JOHN H. FAHEY,
Federal Home Loan Bank Commissioner.

(F. R. Doc. 46-4948; Filed, Mar. 25, 1946; 3:57 p.m.)

Federal Home Loan Bank Administration.

Order No. 5082. Date March 29, 1946.

Whereas it has been and is hereby determined that the efficient and economical accomplishment of the purposes of the Federal Home Loan Bank Act, as amended, will be aided by the action contemplated herein; now, therefore,

It is hereby ordered that effective March 29, 1946, the Federal Home Loan Bank of Los Angeles shall be liqui-

dated and reorganized and all assets and property of any kind or nature of such bank, including any unexpended amounts in approved and outstanding budgets and personnel but excluding officers and directors, are hereby transferred to the Federal Home Loan Bank of Portland and all the liabilities and obligations of such Federal Home Loan Bank of Los Angeles are to be assumed by the Federal Home Loan Bank of Portland. The President of the Federal Home Loan Bank of Portland (hereinafter called Federal Home Loan Bank of San Francisco) is hereby authorized and directed to execute, issue or sign in the name of the Federal Home Loan Bank of San Francisco as the Successor and legal assignee of the assets, property, liabilities and obligations of the Federal Home Loan Bank of Los Angeles such instrument or instruments as may be necessary or advisable and to cancel, assign or otherwise dispose of in whole or in part, any lease under which the Federal Home Loan Bank of Los Angeles has been bound or committed. All members of the Federal Home Loan Bank of Los Angeles are to become members of the Federal Home Loan Bank of Bank of Portland and the Federal Home Loan Bank of Portland (hereinafter called Federal Home Loan Bank of San Francisco) is ordered and directed to issue appropriate evidences of the ownership of all of the stock formerly held by the Federal Home Loan Bank of Los Angeles, including stock purchased and held on behalf of the U. S. Government. The charter of said Federal Home Loan Bank of Los Angeles is hereby cancelled.

It is further ordered and directed that effective March 29, 1946, the said Federal Home Loan Bank of Portland shall move and is hereby moved to the city of San Francisco, California, and shall be known hereafter as the

Federal Home Loan Bank of San Francisco. Subject to the Federal Home Loan Bank Act, as amended, and the charter and by-laws of the Federal Home Loan Bank of San Francisco, including right of dismissal, said bank shall have as its directors, officers, employees, attorneys, and agents the directors, officers, employees, attorneys, and agents transferred, elected, designated, or appointed, to, by or for the Federal Home Loan Bank of Portland for the calendar year 1946 and shall operate under the charter and by-laws used by the Federal Home Loan Bank of Portland until duly changed.

It is further ordered and directed that effective March 29, 1946, and until changed by the Board of Directors of the Federal Home Loan Bank of San Francisco and approved by the Federal Home Loan Bank Administration, the said Federal Home Loan Bank of San Francisco shall maintain a branch of said bank in the cities of Portland, Oregon, and Los Angeles, California.

It is further ordered and directed that in order to provide for adequate representation of the states in the Federal Home Loan Bank of San Francisco region, effective August 1, 1946, the terms of all directors of said bank shall expire and that prior to July 1, 1946, a new election of directors shall be held. The terms of all officers of said bank shall expire upon the designation by the Board of Directors after August 1, 1946, of new officers and their approval by the Federal Home Loan Bank Administration. In such election and in future elections of the Federal Home Loan Bank of San Francisco the states of Nevada and Arizona shall constitute one state with the right of minimum representation to be alternated between each of said states within the rules and regulations and orders of the Federal Home Loan

Bank System providing for a minimum representation from each state in a Federal Home Loan Bank district. On or before July 1, 1946, the Federal Home Loan Bank Administration shall appoint or reappoint four public-interest directors whose terms shall begin August 1, 1946, but shall end respectively December 31, 1946; December 31, 1947; December 31, 1948; and December 31, 1949.

It is further ordered and directed that the Federal Home Loan Bank of San Francisco shall take such other action subject to the approval of the Federal Home Loan Bank Administration as may be necessary or desirable for the effective operation of the federal Home Loan Bank of San Francisco.

* * * * * * * * *

I hereby certify that the above is an order issued by the Federal Home Loan Bank Administration on March 29, 1946.

(Seal) (s) A. V. AMMANN,
Assistant Secretary.

Federal Home Loan Bank Administration.

Order No. 5083. Date March 29, 1946.

Pursuant of Section 3 of the Federal Home Loan Bank Act, as amended, and the powers vested in me by law, the district of the Federal Home Loan Bank of Portland is readjusted and shall have added thereto the states of Arizona, California and Nevada, and the Territory of Hawaii.

The said Federal Home Loan Bank of Portland is moved to San Francisco and shall be known as the Federal Home Loan Bank of San Francisco.

* * * * * * * * *

I hereby certify that the above is an order issued by the Federal Home Loan Bank Administration on March 29, 1946.

(Seal) (s) A. V. AMMANN,
Assistant Secretary.

Federal Home Loan Bank Administration.

Order No. 5084. Dated March 29, 1946.

Pursuant to Section 25 of the Federal Home Loan Bank Act, as amended, and the powers vested in me by law the Federal Home Loan Bank of Los Angeles is dissolved.

* * * * * * * * *

I hereby certify that the above is an order issued by the Federal Home Loan Bank Administration on March 29, 1946.

(Seal) (s) A. V. AMMANN,
Assistant Secretary.

Federal Home Loan Bank Administration.

Order No. 5254. Date May 20, 1946.

Whereas, it has been determined that the Long Beach Federal Savings and Loan Association, Long Beach, California:

Is conducting its business in an unlawful manner;

Is conducting its business in an unauthorized manner;

Is conducting its business in an unsafe manner;

Has a management which is unsafe to manage a Federal Savings and Loan Association;

Has a management which is unfit to manage a Federal Savings and Loan Association;

Is pursuing a course that is jeopardizing the interests of its members;

Is pursuing a course that is jeopardizing the interests of its creditors;

Is pursuing a course that is jeopardizing the interests of the public;

Is pursuing a course that is injurious to the interests of its members;

Is pursuing a course that is injurious to the interests of its creditors; and

Is pursuing a course that is injurious to the interests of the public; and

Whereas, it has been determined to be in the interest of said association, its members, creditors, and the public to appoint a conservator to take possession of said association and to conserve its assets pending further disposition of said association and its affairs;

Now, Therefore, A. V. Ammann is hereby appointed conservator for the Long Beach Federal Savings and Loan Association, Long Beach, California, to take possession of said association and to conserve its assets pending further disposition of said association and its affairs; and, as such conservator, to have and exercise all of the powers and rights, enjoy all of the privileges, and assume and perform all of the duties and responsibilities of his office accorded or imposed by law, the Rules and Regulations for the Federal Savings and Loan System,

and orders issued by the Federal Home Loan Bank Administration, or otherwise.

I hereby certify that the above is an order issued by the Federal Home Loan Bank Administration on May 20, 1946.

/s/ A. V. AMMANN,
Assistant Secretary.

Home Loan Bank Board.

No. 388. Date January 17, 1948.

BE IT HEREBY RESOLVED that the Federal Home Loan Bank Administration Order No. 5254 appointing a Conservator for the Long Beach Federal Savings and Loan Association be and the same is hereby rescinded, such rescission to become effective upon the request of the shareholders of said Association through their authorized representative that the assets of said Association of any and every nature whatsoever belonging to or pertaining to said Association together with all books, records and accounts of every nature pertaining to said Association be delivered to such shareholders upon demand made through their authorized representative.

BE IT FURTHER RESOLVED that the Conservator be and he is hereby authorized and directed to deliver all of the aforesaid assets, records and books of any and every nature to said shareholders through their authorized representative and to make a full and complete accounting to said shareholders for all assets and liabilities of any and every nature pertaining to said Association, and a copy of such accounting be filed with the District Court of the United States, in and for the Southern District of California.

BE IT FURTHER RESOLVED that the Conservator be, and he is hereby directed, to make available for inspection at the office of the Association all of the records and books of said Association to counsel for the Shareholder's Committee or an agent of the shareholders of said Association, or to a representative of the District Court of the United States, in and for the Southern District of California, Central Division.

BE IT FURTHER RESOLVED that a certified copy of this resolution be forthwith delivered to the above named Court and to counsel for each of the parties of record in actions numbered 5254 P.H. and 5678 (WM) PH in said Court, except counsel for Intervenors in said actions, and that a copy be furnished to the Conservator.

* * * * * * * * *

By the Home Loan Bank Board
/s/ J. Francis Moore,
(Seal) Secretary.

Home Loan Bank Board.

No. 2015. Date: September 9, 1949.

WHEREAS it appears to the Home Loan Bank Board that:

1. The Long Beach Federal Savings and Loan Association, Long Beach, California, has failed to file the monthly and annual reports required by the Rules and Regulations for the Federal Savings and Loan System;

2. Said Association has failed and refused to furnish an affidavit of its president or secretary or other officer that, to the best of his knowledge and belief, the books

of said Association correctly reflect the financial condition thereof, as required of all Federal savings and loan associations;

3. Said Association has failed to pay the premiums for insurance of its accounts and the installments thereon due and payable on or about June 5, 1948, December 5, 1948, and June 5, 1949, in the total amount of $36,487.25, in violation and disregard of the statutes of the United States, the Rules and Regulations for Insurance of Accounts, and its contract with the Federal Savings and Loan Insurance Corporation;

4. Said Association and its officers have committed and are committing other violations of law and regulations, including violations set out in the More Definite Statement submitted to said Association on May 29, 1946, and have pursued and are pursuing a course that is jeopardizing and injurious to the interests of its members, creditors, and the public;

It Is Hereby Ordered, pursuant to the authority vested by law in the Home Loan Bank Board and pursuant to the Rules and Regulations for the Federal Savings and Loan System, that the Long Beach Federal Savings and Loan Association, Long Beach, California, appear at a hearing, as hereinafter provided, and show cause, if any it have, why the Home Loan Bank Board should not, for the reasons hereinbefore stated, enter its order or orders for such action as it deems necessary or appropriate, including the appointment of the Federal Savings and

Loan Insurance Corporation as receiver for said Association;

AND IT IS FURTHER ORDERED that said hearing be held before the Home Loan Bank Board or a member thereof or before a Hearing Officer of this Board, as shall be determined by the Board, and be convened at 10:00 o'clock A. M. on October 25, 1949, in Room 831, Federal Home Loan Bank Board Building, 101 Indiana Avenue, N. W., Washington, D. C. The Board or member thereof, or the Hearing Officer who presides at said hearing is hereinafter referred to as Presiding Officer;

AND IT IS FURTHER ORDERED that the Presiding Officer shall have complete charge of the hearing and shall have authority to: administer oaths or affirmations; receive, admit, allow, exclude and deny petitions, motions, and evidence; limit the time within which briefs and reply briefs may be filed and require the furnishing of copies thereof to other parties; make rulings and note objections; hear arguments; adjourn the hearing from time to time and from place to place; and do all such things and exercise all such powers as are necessary or proper to the orderly conduct of the hearing;

AND IT IS FURTHER ORDERED that any person, partnership, association, or corporation claiming to have an interest in the subject matter involved may, at any time before the closing of the hearing, file with the Presiding Officer a petition for leave to intervene at said hearing;

AND IT IS FURTHER ORDERED that the Long Beach Federal Savings and Loan Association, the Home Loan

Bank Board, and any party whose petition for intervention has been allowed, shall have the right, by counsel or otherwise, to appear and be heard at the hearing, to produce, examine and cross-examine witnesses, to introduce documentary or other evidence, and to file briefs and reply briefs;

AND IT IS FURTHER ORDERED that if the Presiding Officer is a member of the Board or a Hearing Officer of the Board he shall, after the close of the hearing, make Proposed Findings of Fact which he shall file as promptly as possible with the Secretary to the Home Loan Bank Board together with (1) the complete transcript of testimony taken, and any exhibits, briefs or other material incorporated in the record of said hearing, and (2) the certificate of the Presiding Officer that he has mailed, by registered mail, a copy of the said Proposed Findings of Fact to the Long Beach Federal Savings and Loan Association, Long Beach, California;

AND IT IS FURTHER ORDERED that the Secretary or an Assistant Secretary to the Home Loan Bank Board, promptly upon the filing of said Proposed Findings of Fact and said transcript, advise all parties, by registered mail, return receipt requested, of the filing thereof, and make such Proposed Findings of Fact and such transcript available for inspection by any party at a price which will cover the reasonable cost of preparation, as determined by the Secretary;

AND IT IS FURTHER ORDERED that the Secretary to the Home Loan Bank Board shall receive for the considera-

tion of the Home Loan Bank Board objections of parties to the said Proposed Findings of Fact, provided that said objections are received within forty-five days from the date on which the said Proposed Findings of Fact are filed by the Presiding Officer with the Secretary to the Home Loan Bank Board as hereinbefore provided;

AND IT IS FURTHER ORDERED that within a reasonable time after the expiration of the time for filing objections to the Proposed Findings of Fact or, if the hearing is held before the Board, within a reasonable time after the close of the hearing, the Board will make a final determination and enter its order or orders thereon;

AND IT IS FURTHER ORDERED that notice of said hearing be served by the Secretary to the Home Loan Bank Board by mailing a copy of this Order, by registered mail, to the Long Beach Federal Savings and Loan Association, 328 American Avenue, Long Beach, California, to Thomas A. Gregory, c/o Long Beach Federal Savings and Loan Association, 328 American Avenue, Long Beach, California, to J. E. Gregory, c/o Long Beach Federal Savings and Loan Association, 328 American Avenue, Long Beach, California, and to Ethel L. Roberts, c/o Long Beach Federal Savings and Loan Association, 328 American Avenue, Long Beach, California.

By the Home Loan Bank Board,

/s/ J. FRANCIS MOORE,

Secretary.

4. District Court Findings Concerning Homeowners Tangled Titles, and Specimen of Notes Seized, and Assignments Made, by Respondent Conservator.

PLATE 4.

CONSTRUCTION
9566

Do Not Destroy This Note: When paid, this note, with Deed of Trust securing same, must be surrendered to Trustee for cancellation, before reconveyance will be made.

Note Secured by Deed of Trust

$4500.00 Long Beach, California, May 28th, 1945.

For value received I promise to pay to Long Beach Federal Savings and Loan Association, a Federal corporation, or order, at the office of Long Beach Federal Savings and Loan Association the principal sum of Forty-five Hundred and no/100 ($4500.00) Dollars, with interest from date hereof, ..., 19....., on unpaid principal at the rate of 6 per cent per annum, interest payable monthly on the 1st day of each month for the period from May 28th, 1945, to August 1st, 1945, both dates inclusive: commencing September 1, 1945, principal and interest payable in monthly installments of Forty-five and no/100 ($45.00) Dollars each, on the 1st day of each month, and continuing until said principal and interest have been paid in full.

Each payment shall be credited first on interest then due and the remainder on principal; and interest shall thereupon cease upon the principal so credited. Should default be made in payment of any installment when due, or in the performance of any agreement in the deed of trust securing the payment of this note, the whole sum of principal and interest shall become immediately due at the option of the holder of this note and shall, at the option of such holder, bear interest during the period of such default at the rate of 8 per cent per annum. Principal and interest payable in lawful money of the United States. If action be instituted on this note, I promise to pay such sum as the Court may fix as attorney's fees. The holder hereof agrees to accept additional payments, provided however, that should the amount prepaid equal or exceed 20 per cent of the original principal amount of the loan, 90 days unearned interest on the amount so prepaid may be charged as a bonus.

Plate 4

CONSTRUCTION

9566

DO NOT DESTROY THIS NOTE: When paid, this note, with Deed of Trust securing same, must be surrendered to Trustee for cancellation, before reconveyance will be made.

FOU

Note Secured by Deed of Trust

$4500.00 ..... Long Beach, California, May 28th, 1945

For value received I promise to pay to Long Beach Federal Savings and Loan Association, a Federal corporation, or order, at the office of Long Beach Federal Savings and Loan Association the principal sum of Forty-five Hundred and no/100 ($4500.00) - - - DOLLARS, with interest from date hereof, 19....., on unpaid principal at the rate of 6 per cent per annum, interest payable monthly on the 1st day of each month for the period from May 28th, 1945, to August 1st, 1945, both dates inclusive: commencing September 1, 1945, principal and interest payable in monthly installments of Forty-five and no/100 ($45.00) DOLLARS each, on the 1st day of each month, and continuing until said principal and interest have been paid in full.

Each payment shall be credited first on interest then due and the remainder on principal; and interest shall thereupon cease upon the principal so credited. Should default be made in payment of any installment when due, or in the performance of any agreement in the deed of trust securing the payment of this note, the whole sum of principal and interest shall become immediately due at the option of the holder of this note and shall, at the option of such holder, bear interest during the period of such default at the rate of 8 per cent per annum. Principal and interest payable in lawful money of the United States. If action be instituted on this note, I promise to pay such sum as the Court may fix as attorney's fees. The holder hereof agrees to accept additional payments, provided however, that should th amount prepaid equal or exceed 20 per cent of the original principal amount of the loan, 90 days unearned interest on the amount so prepaid may be charged as a bonus.

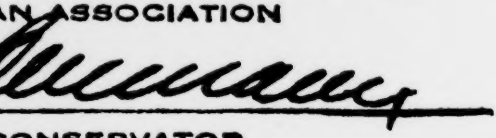
This note is secured by DEED OF TRUST to TITLE SERVICE COMPANY, A California corporation.

William Sharp

Evelyn A. Sharp

Plate 5

PAY TO THE ORDER OF THE FEDERAL HOME
LOAN BANK OF SAN FRANCISCO
LONG BEACH FEDERAL SAVINGS AND
LOAN ASSOCIATION

BY 

CONSERVATOR

Sample of endorsements by conservator of $12,000,000.00 of notes and trust deeds on homes of 8,000 borrowers. All endorsements were undated. (See page X.)

This note is secured by Deed of Trust to Title Service Company, a California corporation.

William Sharp
Evelyn A. Sharp.

Sample of notes aggregating $12,000,000.00 secured by trust deeds on homes of 8,000 borrowers. Conflicting claims caused by seizure and assignment of these notes clouded and tangled titles to borrowers' homes. (See page .....)

PLATE 5.

Pay to the order of the Federal Home Loan Bank of San Francisco. Long Beach Federal Savings and Loan Association. By A. V. Ammann, Conservator.

Sample of endorsements by conservator of $12,000,000.00 of notes and trust deeds on homes of 8,000 borrowers. All endorsements were undated. (See page ....)

Homeowners Titles Tangled and Clouded.

Footnote No. 15 of the Preliminary Injunction of the District Court, Volume XVIII, pages 8288-8293 of record of the District Court, lists fifty or more separate interventions by several hundred homeowners.

Immediately upon seizure of Long Beach Federal Savings and Loan Association, respondent Ammann, as conservator, assigned and transferred several thousand notes and deeds of trust seized in the premises of the Association. A specimen of such notes is Plate No. 4 and a specimen of such assignments is Plate No. 5.

In such intervention orders, the District Court made findings. From some of these orders, respondents took appeals to the Court of Appeals, which were later dismissed. The other orders became final from lack of appeal therefrom. Specimen findings from such intervention interpleader orders are [R. 3137-3139, Apl. 12511]:

> It further appearing to the Court that neither said conservator alone, nor said Long Beach Federal Savings and Loan Association alone, nor any of the parties to this action can, without the aid and assistance of this Court, make, execute and deliver to said petitioners in intervention an effective release and discharge of the said real property described in said Complaint from the lien, encumbrance and obligation of said deed of trust securing said note in favor of said Long Beach Federal Savings and Loan Association, and it further appearing that grave and irreparable damage will be suffered by the Petitioners through being unable to clear the title to their said real property of the obligation of said notes and deeds of trust; and it further appearing that said petitioners . . . have offered to pay the amount due thereunder in full satisfaction thereof, but are in doubt as to who is entitled to receive such payments thereunder in order to secure a valid release and reconveyance and obtain a merchantable title to their said real property.
>
> And it further appearing that unless permitted to discharge said obligation and clear the title to said

real property, Petitioners will sustain damage, and it further appearing that payment of the amount due thereunder into the Registry of this Court would be in aid of preserving the assets of said Association from further loss or damage, . . . that this litigation may continue for many additional months or even years, during which time irreparable damage will continue and increase to the detriment and harm of the Petitioners.

And it further appearing that there are no abstractors in Los Angeles County, and abstracts of title are not a basis for establishment of merchantable title for real property, but rather by custom and usage those dealing with real property in Los Angeles County, California, demand and customarily receive policies of title insurance issued by Title Insurers, whose policies of title insurance have, therefore, become by usage and custom a virtually necessary element of a merchantable title for real property in Los Angeles County, thereby insuring that the title to said real property has been cleared and that the owner thereof has a merchantable title with the necessary policy of title insurance required by custom and usage.

Now, therefore, the Court being fully advised in the premises grants said motion to intervene *and accepts jurisdiction of said complaint in intervention* and Petitioners are hereby made a party plaintiff in intervention in the above-entitled proceeding . . .

Respondents in 1947-1948 took appeals to the Circuit Court of Appeals for the Ninth Circuit from several orders containing the findings above quoted. [R. 3152, Apl. No. 12511.] Such appeals were dismissed in 1948. [R. 3976, Apl. No. 12511.]

$14,000,000.00 Interpleader to Clear Homeowners' Titles.

In March of 1948, after final administrative order No. 388, by which respondents rescinded their appointment of the conservator of Long Beach Federal Savings and Loan Association, restored its founding management, and ordered the removed conservator to account titles of the approximately 8,000 homeowners were yet clouded and tangled.

The District Court on January 23, 1948, had made its final judgment based upon such final administrative order, which judgment read in part [R. 8321, Apl. No. 12511]:

> It Is Further Ordered that possession, management, control, custody and operation, and all evidences of title and/or ownership of all property, . . . real, personal, or mixed, . . . shall be transferred and moved from and by said defendant, A. V. Ammann, as such conservator . . . and shall pass and be delivered to the Long Beach Federal Savings and Loan Association. . . .

Such judgment, however, did not remove the claims of the Federal Home Loan Banks of San Francisco, Los Angeles, or Portland, whichever exists. Upon such $14,-

000,000.00 interpleader, the Court made orders which read in part, as follows [R. 8410-8411, Apl. No. 12511]:

> . . . That among the injuries which would flow to said homeowners, and borrowers and purchasers by failing to require such deposit pending the final judgment in the within action, are (1) the inability of said thousands of borrowers and homeowners to secure a merchantable, or insurable title to the particular real property involved, which in turn would prevent either a sale thereof, or a loan or refinancing thereon, or a payment and termination of the interest and obligations of the present loans and deeds of trust thereon, and (2) a multiplicity of suits which might involve all of the issues raised, or which can be raised, in the instant litigation, and all of the parties to the present litigation; which injuries and damage are found to be grave, irreparable and continuing as to the thousands of borrowers and homeowners who have given their notes and deeds of trust to said Long Beach Federal Savings and Loan Association and conveyed the titles to their homes as security for said loans.

and ordered [R. 8533-8534, Apl. No. 12511]:

> The lien and obligation and charge of the claims of the Federal Home Loan Bank of Portland, sometimes known as Federal Home Loan Bank of San Francisco, and/or Federal Home Loan Bank of San Francisco, and/or Federal Home Loan Bank of Los Angeles (or either or both, or the total combined

amount of said claims) and either or both of the same are hereby lifted and removed from the said notes and deeds of trust and each and all of them and are transferred to, and restricted to, and shall be claims to, and obligations upon, the said sum of $5,300,000.00 in bonds herein ordered deposited in Court and such additional sum in money from the sum in excess of $1,500,000.00 already in the Registry of this Court, sufficient to make the combined total sum of $6,324,098.35 with interest on $6,300,000.00 at 2% per annum from March 10, 1948, until paid . . .

. . .

It is further ordered that any and all endorsements appearing on each or any of the notes and trust deeds hereinafter described in favor of said Federal Home Loan Banks of San Francisco and any and/or all instruments assigning or transferring or purporting to assign or transfer said notes and/or trust deeds are hereby cancelled, and the title thereto and to each and every of such trust deeds and notes, if any title passed from said Long Beach Federal Savings and Loan Association, is hereby revested in said Long Beach Federal Savings and Loan Association.

Thereby the thousands of endorsements (a specimen of which is Plate No. 5) were cancelled by final order of the Court below (final for four years from lack of appeal therefrom).

5. Orders of Court of Appeals Denying Writs of Prohibition Against District Court in 1950.

United States Court of Appeals
for the Ninth Circuit.

United States of America *et al.*, Petitioners, vs. Peirson M. Hall, District Judge, *et al.*, Respondents. No. .....

ORDER.

The motion of the United States of America and others "for leave to file petition for writ of prohibition, mandamus or other appropriate relief and for rule to show cause" is denied.

CLIFTON MATHEWS,
WILLIAM HEALY,
HOMER T. BONE,
United States Circuit Judges.

(Endorsed): Filed Jun 1, 1950. Paul P. O'Brien, Clerk.

A true copy. Attest: June 3, 1950. Paul P. O'Brien, Clerk. By Frank H. Schmidt, Deputy.

United States Court of Appeals
for the Ninth Circuit.

Federal Home Loan Bank of San Francisco *et al.*, Petitioners, vs. Peirson M. Hall, District Judge, *et al.*, Respondents. No. .....

ORDER.

The motion of Federal Home Loan Bank of San Francisco and others "for leave to file petition for writ of prohibition, mandamus or other appropriate relief and for order to show cause" is denied.

CLIFTON MATHEWS,
WILLIAM HEALY,
HOMER T. BONE,
United States Circuit Judges.

(Endorsed): Filed Jun 1, 1950. Paul P. O'Brien, Clerk.

A true copy. Attest: June 3, 1950. Paul P. O'Brien, Clerk. By Frank H. Schmidt, Deputy.

6. List of Litigation.

In the United States District Court, Southern District of California.

1. No. 5421-P.H., commenced May 27, 1946.
2. No. 5678-P.H., commenced August 22, 1946.
3. No. 7989-W.M, commenced February 17, 1948.
4. No. 13953-B.H., commenced March 22, 1952.
5. No. 13979-C, commenced April 3, 1952.

In the United States District Court, Northern District of California.

6. No. 28203-G., commenced July 22, 1948.

In the Superior Court of the State of California, in and for the County of Los Angeles.

7. No. L.B.-C-14492, commenced January 16, 1948.
8. No. L.B.-C-18144, commenced March 21, 1952.
9. No. 597402, commenced March 27, 1952.

In the United States Supreme Court.

10. Fahey, *et al.*, vs. Mallonee, *et al.*, 332 U. S. 245, 91 L. Ed. 2030, decided June 23, 1947.
11. *Ex parte* Fahey, 332 U. S. 258, 91 L. Ed. 2041 (a writ of prohibition, mandamus and/or injunction against United States District Judge Peirson M. Hall, denied in June, 1947).

In the United States Court of Appeals for the Ninth Circuit.

12. Ammann, *et al.*, vs. Mallonee, *et al.*, No. 11751, dismissed February 6, 1948.
13. Fahey, *et al.*, vs. Mallonee, *et al.*, No. 11867, dismissed February 25, 1948.

14. Fahey, *et al.*, vs. Mallonee, *et al.*, No. 12511, commenced December 29, 1949, by Fahey, *et al.*, and January 5, 1950, by San Francisco Bank, *et al.*

15. Petition by Fahey, *et al.*, for writ of prohibition, mandamus or other appropriate writ, vs. United States District Judge Peirson M. Hall. Petition presented February, 1950, denied June 1, 1950. (No number assigned.)

16. Petition by Federal Home Loan Bank of San Francisco, *et al.*, for writ of prohibition, mandamus or other appropriate writ, vs. United States District Judge Peirson M. Hall. Petition presented February, 1950, denied June 1, 1950. (No number assigned.)

YET UNDECIDED

17. Fahey, *et al.*, vs. Ronald Walker, Special Master of the United States District Court, No. 12575, presently pending appeal from order allowing fees to Special Master, taken May 3-5, 1950.

18. Fahey, *et al.*, vs. O'Melveny & Myers, *et al.*, No. 12591, commenced June 20, 1950.

YET UNDECIDED

19. Fahey, *et al.*, vs. Ronald Walker, Special Master of the United States District Court, No. 12575, presently pending appeal from order allowing fees to Special Master, taken about November 28, 1950, and December 8, 1950.

YET UNDECIDED

20. Fahey, *et al.,* vs. Ronald Walker, Special Master of the United States District Court, No. 12893, presently pending appeal from order allowing fees to Special Master, taken February, 1951.

YET UNDECIDED

21. Fahey, *et al.,* vs. Ronald Walker, Special Master of the United States District Court, No. 13055, presently pending appeal from order allowing fees to Special Master, taken about May 23, 1951.

YET UNDECIDED

22. Fahey, *et al.,* vs. Howard V. Calverley, Receiver, No. 13411, presently pending appeal from order appointing Receiver, taken March 18, 1952.

YET UNDECIDED

23. Fahey, *et al.,* vs. W. I. Gilbert, Jr., *et al.,* No. 13558, presently pending appeal from order allowing costs to Court's Receiver, taken about August, 1952.

Congressional Investigations.

1. Tenth Intermediate Report of the Select Committee to Investigate Executive Agencies, Seventy-ninth Congress, Second Session, Investigation of Federal Home Loan Bank Administration, dated July 25, 1946.
2. 1950-1951 Investigation by Holifield's Special Subcommittee of the Committee on Expenditures in Executive Departments, House of Representatives, Eighty-first Congress, Second Session, Investigation of the Home Loan Bank Board.

7. **Order Appointing Receiver for Preservation of $14,000,000.00 of Notes and Security on Deposit With District Court Against Expiration of Statute of Limitations.**

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

Judgment. Docketed and entered Mar. 15, 1952. Edmund L. Smith, Clerk. By Theodore Hocke, Deputy Clerk.

Filed Mar. 15, 1952. Edmund L. Smith, Clerk. By Theodore Hocke, Deputy Clerk.

CIVIL ACTION No. 5421-P. H.

(and consolidated, related and enjoined Actions No. 5678-P. H. in said Southern District, No. 7989-W. M. in said Southern District, No. 28203-G in the Northern District, and No. LB-C-14492 in the Superior Court of California.)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER APPOINTING RECEIVER FOR THE LIMITED PURPOSE OF PRESERVATION OF PROPERTY ON DEPOSIT IN THIS COURT, AND OF RIGHTS, CLAIMS AND LIABILITIES OF VARIOUS PARTIES THERETO OR THEREON AND FOR OTHER PURPOSES.

Mallonee, Bucklin and Fergus, the Shareholders' Protective Committee of the Long Beach Federal Savings and Loan Association,

Plaintiffs,

and

Long Beach Federal Savings and Loan Association, et al.,

Cross-Claimants and Third-Party Plaintiffs,

vs.

Fahey, Ammann, (Divers, Adams, LaRoque, Heisler, members of the Home Loan Bank Board, trustees of the Federal Savings and Loan Insurance Corporation, their alter-egos), The Federal Savings and Loan Insurance Corporation, The Home Indemnity Company, Federal Home Loan Bank of Portland, sometimes also known and referred to as the Federal Home Loan Bank of San Francisco, Federal Home Loan Bank of Los Angeles, et al.,

Defendants and Cross-Defendants.

Title Service Company, a corporation,

Defendant, Cross-Claimant in Interpleader, and Third-Party Plaintiff,

vs.

John H. Fahey, et al.,

Third-Party Defendants.

Robert H. Wallis,

Defendant, Cross-Claimant in Interpleader and Third-Party Plaintiff,

vs.

John H. Fahey, et al.,

Third-Party Defendants.

Home Investment Co., a corporation,

Intervenor,

vs.

Paul Mallonee, et al., and John H. Fahey, et al.,

Defendants in Intervention.

(Consolidated Action No. 5678-P. H.)

Federal Home Loan Bank of Los Angeles, Coast Federal Savings and Loan Association, Standard Federal Savings and Loan Association, First Federal Savings and Loan Association of Wilmington, Central Building and Loan Association, State Savings and Loan Association, Los Angeles American Savings and Loan Association,

Plaintiffs,

vs.

Federal Home Loan Bank of Portland and/or San Francisco,

Defendants.

Michael J. O'Rourke,

Intervenor,

vs.

Paul Mallonee, et al., and John H. Fahey, et al.,

Defendants in Intervention.

NOTE: There were 50 separate and different intervention actions, each with one or more, and some with many parcels of real property involved, the earliest one being filed by Michael J. O'Rourke on September 25, 1946, and the latest being filed by Wrigley Heights, Inc., and Wrigley Heights Second, Inc., on October 28, 1947.

Long Beach Federal Savings and Loan Association,

Defendant, Third-Party Plaintiff, and Cross-Claimant,

vs.

Land Title Insurance Co., a corporation,

Defendant and cross-defendant.

Long Beach Federal Savings and Loan Association,

Defendant, Third-Party Plaintiff, and Cross-Claimant,

vs.

Wrigley Heights, Inc., Wrigley Heights Second, Inc., Glenn A. Doughty,

Defendants and Cross-Defendants.

Newendorp-Bradley, et al.,

Plaintiffs,

vs.

T. A. Gregory, et al.,

Defendants.

Long Beach Federal Savings and Loan Association,

Defendant, Third-Party Plaintiff and Cross-Claimant,

vs.

Newendorp-Bradley, et al.,

Cross-Defendants.

George Turner,

Defendant and Cross-Claimant in Interpleader,

vs.

Newendorp and Bradley, et al., Long Beach Federal Savings and Loan Association, Paul Mallonee, et al., John H. Fahey, et al.,

Cross-Defendants.

Long Beach Federal Savings and Loan Association,

Defendant, Third-Party Plaintiff and Cross-Claimant,

vs.

Ben A. Perham, William A. Davis, and 29 other officers and/or directors of Federal Home Loan Bank of Portland and/or San Francisco,

Cross-defendants.

Roy E. Hegg,

Defendant and Cross-Claimant,

vs.

John H. Fahey, et al., Paul Mallonee, et al., Long Beach Beach Federal Savings and Loan Association, Federal Home Loan Bank of Portland and/or San Francisco, all other officers and directors of Federal Home Loan Bank,

Cross-Defendants.

Pioneer Investors Savings and Loan Association, a corporation, Home Mutual Savings and Loan Association, a corporation, California Savings and Loan Company, a corporation, Thrift Federal Savings and Loan Association, a corporation, San Francisco Federal Savings and Loan Association, a corporation, Oakland Federal Savings and Loan Association, a corporation, Community Savings and Loan Association, a corporation, Citizens' Federal Savings and Loan Association, a corporation, Berkeley Guarantee Savings and Loan Association, a corporation, and Golden West Savings and Loan Association, a corporation,

Plaintiffs,

vs.

Federal Home Loan Bank of San Francisco, et al.,

Defendants.

Long Beach Federal Savings and Loan Association,

Defendant, Third-Party Plaintiff, and Cross-Claimant,

vs.

Pioneer Investors Savings and Loan Association, a corporation, Home Mutual Savings and Loan Association, a corporation, California Savings and Loan Company, a corporation, Thrift Federal Savings and Loan Association, a corporation, San Francisco Federal Savings and Loan Association, a corporation, Community Savings and Loan Association, a corporation, Oakland Federal Savings and Loan Association, a corporation, Citizens' Federal Savings and Loan Association, a corporation, Berkeley Guarantee Savings and Loan Association, a corporation, and Golden West Savings and Loan Association, a corporation,

Cross-Defendants.

Long Beach Federal Savings and Loan Association,

Defendant, Third-Party Plaintiff, and Cross-Claimant,

vs.

William A. Davis, J. Arthur Younger and 78 other officers and directors of said cross-defendant associations, Pioneer Investors Savings and Loan Association, et al.,

Cross-Defendants.

Long Beach Federal Savings and Loan Association,
Defendant, Third-Party Plaintiff and Cross-Claimant,

vs.

Federal Savings and Loan Insurance Corporation,
Cross-Defendant.

Long Beach Federal Savings and Loan Association,
Cross-Claimant,

vs.

John H. Fahey; A. V. Ammann; George K. Bramley; Home Loan Bank Board, as an entity; William K. Divers, Chairman; J. Alston Adams, member; O. K. LaRoque, member; Kenneth G. Heisler, member; Federal Savings and Loan Insurance Corporation; Federal Home Loan Bank of San Francisco; Federal Home Loan Bank of Portland; Ben A. Perham; William A. Davis; Fred J. Bradshaw; M. L. Carrier; I. W. Dinsmore; Douglas H. Driggs; R. J. Fremou; Roy E. Hegg; L. H. Hoffman; Guy E. Jaques; C. W. Leaphart; L. C. Wetzel; Gerritt Vander Ende; Paul Bartling; W. D. Hopping; J. W. Maxwell; W. O. McCaw; Worth D. Wright; Frank H. Johnson; Irving Bogardus; Frederick W. Ruble; R. Floyd Hewitt; J. H. Andrews; C. N. Bloomfield; P. C. Bulen; F. M. Donahoe; Joseph E. Swindlehurst; Thomas T. Taylor; Archibald B. Young; C. V. Carter; Joe Crail; The Federal Home Loan Bank of Los Angeles; The Home Indemnity Company; Harold Lee Newendorp; Charles E. Bradley and George Turner; Wayne H. Sones and Helen M.

Sones, husband and wife; Pacific Tile & Porcelain Company; U. S. Credit Bureau, Inc.; George W. Hair, dba Geo. Hair & Associates; Maurice Goulet, dba Medical & Professional Bureau; M. E. Spice; Surety Finance & Adjustment Company; R. A. Riddell, Collector of Internal Revenue at Los Angeles, California, Sixth District; Jackson Turner and Belle Turner, husband and wife; Jerry S. Jacobs; Walter E. Hoffman; Jerry S. Jacobs and Walter E. Hoffman, a partnership, dba Hoffman & Jacobs; Jerry S. Jacobs and Jetta Jacobs, husband and wife; E. L. Hexberg; Jesse C. Hexberg; E. L. Hexberg and Jesse C. Hexberg, dba Hexberg Bros. Lumber Co.; and Harry E. Schauer and Mae E. Schauer, husband and wife;

Shareholders' Protective Committee; Mabel Fergus, member; Winnie Bucklin, member; Flora E. Mallonee, member; Title Service Company; and Robert H. Wallis; and also for benefit of, or

vs.

the following Homeowners:

George S. Carter and Mary I. Carter, husband and wife; H. E. Conley and Myrtle Conley; husband and wife; J. Wallis Cordes and Ruth Cordes, husband and wife; George L. DeLange and Blanch DeLange, husband and wife; Fred G. Hunter and Melba N. Hunter, husband and wife; Patrick C. Fitzgerald; Helen O. Schoenhardt, a widow; Lauray DeBolt, a married woman; C. J. Alexander and Elaine A. Alexander, husband and wife; Jack E. Smith and Lucille Smith, husband and wife; Ray L. Smith and Thelma Smith, husband and wife; Virgil D. Price and Wilda S. Price, husband

and wife; Robert H. Klepinger and Neoma Klepinger, husband and wife; Robert O. Behen; Johnnie William Meyer and Edna F. Meyer, husband and wife; Esperance W. Marker and Ethel Murrel Marker, husband and wife; Fred F. Eichert, Jr., and Vernon Page Eichert, husband and wife; Fred Nitchman and Evelyn Nitchman, husband and wife; Arthur Elmer Wells and Floy Low Wells, husband and wife; George O. Marks and Constance R. Marks, husband and wife; Bernard J. Menke and Rose F. Menke, husband and wife; Ernest O. Hadley and Ruth Mildred Hadley, husband and wife; James R. McQueen and Eva E. McQueen, husband and wife; James H. White and Gloria L. White, husband and wife; Clifford L. Ruscher and Ethel M. Ruscher, husband and wife; Frank J. Koch and Nell Irene Koch, husband and wife;

and all fictitious defendants and cross-defendants, as the same are named in all pleadings of all parties,

Defendants and Cross-Defendants.

. . .

Said Motion was argued by all counsel desiring so to do and, having argued, counsel submitted the matter, and the court having considered the evidence, both oral and documentary, and from the verified motions, affidavits and evidence (both oral and documentary) presented, and from all matters produced at said hearing and from the records, orders, judgments, pleadings, and proceedings heretofore had in the above consolidated causes, the Court therefrom and from said previous hearings, findings, orders, and judgments NOW FINDS:

1. That notice of the time and place of hearing of said petition and motion for appointment of receiver for limited purposes, and the method of notice, and the manner of service of such notice, were all prescribed and defined by this Court in its Order of February 14, 1952.

2. That notice was given and served as required by said Order to Show Cause. That such notice so given and served was reasonable and adequate notice to all parties concerned in the hearing of said Petition and Motion for Appointment of Receiver, etc.

3. That by various proceedings heretofore had in the above consolidated actions; there has been deposited in Court under an order of this Court, approximately the sum of $1,500,000.00 in cash, four documents stated to be promissory notes in the face amount of $6,300,000.00, (for convenience said documents are hereinafter referred to as notes), and government bonds in the sum of $5,-300,000.00 face, with attached interest coupons in excess of $500,000.00 at the present time, which property now remains on deposit in this Court. Attached hereto, marked Exhibit "F," and made a part hereof, is a true and correct copy of the Order of this Court made and dated March 13, 1948, requiring the said San Francisco Bank to deposit the said notes in the face amount of $6,300,000.00 in this Court, together with the security thereon, and that attached hereto and marked Exhibit "H," and made a part hereof, is a true and correct copy of the Order of this Court made and dated March 26, 1948, permitting the withdrawal of deeds of trust deposited under said Order of March 13, 1948, and the substitution therefor of said U. S. Government Bonds. (That said Exhibit "F" omits the detailed description of

the deeds of trust and notes which are set forth in the original of said Order, but that a detailed description thereof can be had by reference to page 8423 to and inclusive of 8519 of the transcript of record on appeal in case No. 12511 of the U. S. Court of Appeals for the Ninth Circuit). That in addition to the several thousand trust deeds and notes deposited in Court by said San Francisco Bank, as set forth in Exhibit "F," there was also from time to time deposited in this Court notes and trust deeds securing the same by either the owners of the approximately 400 individual parcels of property or someone claiming ownership in said trust deeds and notes, which latter said trust deeds and notes have also by various and sundry orders of the Court been released from the custody of the Court under conditions set forth in the various orders applicable thereto. That in addition to the foregoing there have been other deposits in Court by interpleader Turner of asserted rentals in the approximate sum of $18,000.00, and sums of money equivalent to premiums claimed to be due to the Federal Savings and Loan Insurance Corporation amounting to approximately $90,000.00, and a cashiers' check in the sum of $50,000.00 deposited by Robert H. Wallis.

4. That many contentions and claims are made in this consolidated action concerning the validity of said notes and the validity and lawfulness of the conduct, transactions and actions of various persons and institutions and occurrences connected with the execution of said notes, or otherwise relating to such conduct and transactions, and many contentions are made concerning the ownership of the property now on deposit in this Court and the liabilities or asserted liabilities and rights of numerous persons, associations and officials. That said contentions,

claims, and counterclaims are inextricably interwoven with each other and with the accounting heretofore ordered by the Home Loan Bank Board and by this Court of defendant Ammann as conservator or purported conservator of said Long Beach Federal Savings and Loan Association, and that great expense to various parties has already been and occurred in this litigation in connection with the matters and things heretofore heard or decided by this Court and in connection with said accounting and objections thereto.

5. That an appeal is now pending in the United States Court of Appeals for this Circuit from an Order made by this Court on December 1, 1949, in which various contentions are made concerning the jurisdiction and power of this Court to act. That while this Court has repeatedly held, and again here adheres to its conclusion that it has jurisdiction, it nevertheless recognizes its duty to protect and preserve the property which has been deposited in Court, and the rights and claims and liabilities of the various parties thereto, and their rights to have the same litigated and finally determined on the merits.

6. That it is contended that said notes were executed by the said Ammann during the period that he was acting as conservator, and without repeating or attempting to delineate all of the claims of invalidity, it is nevertheless recognized that claims are made of the invalidity of said Ammann's actions, and that claims are also made that the Long Beach Association nevertheless received the benefit of whatsoever money was paid or delivered in connection with the execution of said documents, and that if said documents are ultimately held to be valid promissory notes, the statute of limitations may expire on accrued interest on March 31, 1952, and that the statute of limi-

tations will shortly thereafter run on said, or some of said notes.

7. Among other questions arising and requiring decision on the merits of the within litigation are those concerning the validity of the orders which created or attempted to create the San Francisco Bank, and dissolved or attempted to dissolve the Los Angeles Bank and the Portland Bank and the various related orders concerning the transfer of the property of any or all of said institutions. That there exists the possibility that there may be an ultimate judgment of a competent court holding that said documents designated as promissory notes are invalid, and that there exists, or may have existed, or may exist, causes of action in either the San Francisco Bank or the Los Angeles Bank, or the Portland Bank, whichever one or more may be ultimately held to validly exist, for money had and received, possible statutory liability, unjust enrichment, account stated, money lent, constructive trust, negligence on the part of past and present officers and directors of the San Francisco Bank, declaratory relief, open book account, and on action-over against the persons, officials and organizations mentioned in paragraph 9 hereof, in addition to causes of action on the face of said notes, and that it is the duty of this Court, among other things, to preserve such causes of action if they exist, and the rights of the parties to assert their existence and the liability of any or all persons who might be ultimately found to be liable.

8. That all of the stock of the Federal Home Loan Bank, whether it is designated as San Francisco Bank, Los Angeles Bank, or Portland Bank, is owned by approximately 300 savings and loan associations or other institutions and not by the United States or any agency

thereof, and that the loss, if any, would or might ultimately occur, may therefore fall on such institutions and/or the public who have deposited or entrusted money therein.

9. That contentions are made by various parties that liability by way of an action-over, or otherwise, does exist in connection with said notes, or the conduct transactions and occurrences in relation thereto and otherwise against the following: Long Beach Federal Savings and Loan Association, Federal Savings and Loan Insurance Corporation, A. V. Ammann; as conservator, George K. Bramley, Deputy Conservator, William K. Divers, Chairman, J. Alston Adams, O. K. LaRoque, and Kenneth G. Heisler, members of the Home Loan Bank Board and trustees of the Federal Savings and Loan Insurance Corporation, L. H. Hoffman, Guy E. Jaques, J. H. Andrews, Fred J. Bradshaw, Douglas H. Driggs, J. W. Maxwell, Worth D. Wright, R. Floyd Hewitt, Roy E. Hegg, Ben A. Perham, L. C. Wetzel, I. W. Dinsmore, Paul Bartling, C. N. Bloomfield, W. D. Hopping, W. O. McCaw, M. L. Carrier, R. G. Fremou, C. W. Leaphart, P. C. Bulen, William A. Davis, Thomas T. Taylor, Joseph E. Swindlehurst, Joe Crail, C. V. Carter, Archibald B. Young, F. M. Donahoe, and Harold B. Starkey, all former or present directors of San Francisco Bank; Home Loan Bank Board, Frank H. Johnson, Irving Bogardus, Gerritt Vander Ende, Frederick W. Ruble and Frank C. Noon, all former or present officers of San Francisco Bank; Title Service Company, Mallonee, Bucklin and Fergus, the Shareholders' Protective Committee of Long Beach Federal, Carl R. Gray, Jr., Administrator of Veterans' Administration, Raymond M. Foley, Administrator and Franklin D. Richards, Commissioner of the Federal Housing Administration; Home Indemnity Com-

pany, and others whose names or identity may not at this time be known but who may be included as fictitious defendants.

10. That a question arises as to whether or not by permitting the San Francisco Bank to file an independent suit in the state court, recovery could ultimately be had, either upon any of the causes of action other than upon a cause of action on promissory notes, or whether or not recovery could be had in the event of an ultimate judgment as to the invalidity of said notes, not only as to Long Beach Federal Savings and Loan Association but also as to any of the persons or institutions who may or might be liable by way of an action-over, or for negligence, or otherwise, and in addition thereto serious questions arise as to whether or not by permitting such action in the state court as proposed in the motion of the San Francisco Bank, a waiver of the rights of whoever might be ultimately entitled to prevail, might occur whether San Francisco Bank, Los Angeles Bank, Portland Bank, or either or any of them, to the foreclosure of a pledge for the various reasons set forth in the statement by this Court at the commencement of this hearing today and set forth in the transcript and incorporated herein by reference.

11. That while it is contended the San Francisco Bank has not heretofore in its pleadings or proposed pleadings asserted liability for any of the causes of action described in paragraph 7 hereof, except on said notes, and some question may arise as to whether or not the statute of limitations has run on said causes of action, or any of them, it is nevertheless in the interest of justice that under Rule 13(f) F. R. C. P. the San Francisco Bank be permitted to amend its pleadings by filing a cross-claim in this Court in these consolidated proceedings on

condition that it shall, in addition to the proposed defendant and the proposed form of cross-claim attached to the motion of San Francisco Bank, join as cross-defendants all of the persons and institutions heretofore listed in Finding No. 9, and shall assert liability on all the causes of action set forth in Paragraph 7 hereof.

12. That it is contended by counsel for the San Francisco Bank that no cause of action or claim for relief exists against any party to this lawsuit or other person, official, or organization, except as to the Long Beach Federal Savings and Loan Association only.

13. That in the event that the asserted obligation of $6,300,000.00 together with interest be rendered uncollectible by the expiration of the statutes of limitation or failure to sue defendants liable or responsible for the payment thereof, or for failure to assert the claims or causes of action set forth in Paragraph 7 hereof, it would result in what might amount to a destruction of assets on deposit in this Court and in an impairment thereof, and it presently appears that such loss, if the same should occur, is in an amount in excess of the present reserves and surpluses of the said San Francisco Bank, Los Angeles Bank, or Portland Bank, whichever one or more is or may be finally held to have legal existence.

14. That in view of the possible claims or causes of action as set forth in Paragraph 7 against the parties set forth in Paragraph 9 hereof, and the contention of the San Francisco Bank that liability exists against none of the said parties mentioned in Paragraph 9 except the Long Beach Federal Savings and Loan Association, and in view of the possibility that statutes of limitations may have run or may be about to run upon said claims for relief or causes of action, and against certain individuals,

officials, or organizations set forth in Paragraph 9 hereof, it appears in the interests of justice, and that all of the rights and claims and causes of action mentioned in Paragraph 7 hereof, or any others which may exist, will be preserved regardless of the persons, officials, or organizations who, or which, may be ultimately held liable and that the property now on deposit in this Court will be preserved and conserved by the appointment of a Receiver for the limited purpose of bringing a suit or suits in the Superior Court of the State of California upon all of the claims or causes of action set forth in Paragraph 7 hereof, and any other cause of action or claim that such receiver and his counsel may deem advisable, and against all of the persons, officials, parties or organizations set forth in Paragraph 9 hereof, and in addition thereto for the limited purpose of permitting such receiver to file a cross-claim in intervention in the within consolidated action upon all of said claims or causes of action and against all of said persons, parties, officials and/or organizations.

15. That all findings of fact heretofore found in the previous orders of this Court are again found to be true.

16. That the papers, files and records in the within proceedings are exceedingly voluminous. That the claims, cross-claims, and counterclaims, and assertions of rights and liabilities are exceedingly complicated. That in view of the requirement that some action be taken before March 31, 1952, sufficient time does not exist for any counsel not already in this case to familiarize himself with the matters and things which would be required in order to prepare and file the cross-claim and the suit or suits herein authorized to be filed by the receiver, and that therefore, in the interests of justice, it appears meet and proper that this Court should designate one of counsel

who has heretofore appeared in this case and is familiar with it and its many ramifications to act as counsel for the receiver in said proceedings, and that W. I. Gilbert, Jr., is such a person. That in the event the position required to be taken by said W. I. Gilbert, Jr., for clients whom or which he already represents in this case becomes inconsistent with his representation of the receiver, that that will be sufficient time to permit a receiver to employ, or this Court to appoint, other counsel for the receiver. That such inconsistency does not presently appear.

CONCLUSIONS OF LAW.

1. All of the conclusions of law stated in the findings of fact are herein again found to be conclusions of law whether or not expressly stated.

2. All of the conclusions of law heretofore found in the previous Orders of this Court are heretofore found to be conclusions of law herein without being separately stated.

3. That the interests of justice require the filing of the cross-claim by the San Francisco Bank as set forth in said findings of fact.

4. That the interests of justice require the appointment of a receiver for the limited purposes set forth in said findings of fact to file the action or actions, and take the proceedings set forth therein.

5. That the interests of justice require the denial of the motion of the San Francisco Bank to file a suit in the Superior Court of the State of California as set forth in its motion.

6. That this Court has jurisdiction to make the within findings of fact, conclusions of law and order.

ORDER.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That the motion of the San Francisco Bank for permission to file a suit in the Superior Court of the State of California as set forth in its motion therefore be, and it is hereby denied; and

2. That the San Francisco Bank be and hereby is permitted to file a cross-claim and/or supplemental and/or amended counter-claim and/or amended and supplemental cross-claim in the within consolidated action on the condition that in addition to proposed defendant Long Beach Federal Savings and Loan Association and the proposed form of cross-claim attached to the motion of said San Francisco Bank, it shall join as cross-defendants all of the persons and institutions heretofore listed in Finding No. 9 and shall assert liabilities on all of the causes of action set forth in Paragraph 7 of the Findings of Fact; and

3. That Howard V. Calverley be and is hereby appointed Receiver for the limited purposes of bringing an action against the persons, parties, officials or organizations set forth in Paragraph 9 of the Findings of Fact and upon all of the claims and/or causes of action set forth in Paragraph 7 of the Findings of Fact, and is hereby authorized to employ W. I. Gilbert, Jr., as counsel to represent said Receiver in said actions; and

4. That upon the filing of said suit or suits in the Superior Court of the State of California, said Receiver and his counsel, shall procure the issuance of summons thereon, and shall not serve the same until further order of this Court; and

5. That upon the filing of said cross-claim in intervention in the within consolidated action in this Court by the Receiver, and the issuance of summons, no service thereof shall be had until further Order of the Court; and

6. That said Receiver and his counsel may, upon appropriate notice, apply to this Court for allowances on account of Receiver and attorneys fees, or other costs and expenses; and

7. That said Receiver, or any one or more of the parties to this litigation may, at any time or times, that he, it or they, deem it appropriate or necessary, apply to this Court upon such further notice to all parties as the Court may then direct, for expansion of said Receiver's powers, or for additional powers for said Receiver as the same may appear necessary or proper for the protection of the rights and claims of any of the parties to this litigation for the protection and preservation of the property now on deposit in the Court; and

8. That in view of the fact that the action or actions to be filed in the Superior Court of the State of California are to be stayed until further order of this Court after the issuance of summons, it is unnecessary to require bond of the Receiver as no tangible property or assets can or will come into his possession until or unless it is further ordered by this Court; and

9. That it is improbable that this Order can foresee and itemize all of the complex circumstances and requirements, arising or likely to arise, in connection with said Receiver's actions and efforts to preserve and protect the assets, notes, securities and property, of said Federal Home Loan Banks and the various stockholders thereof; and

That the Court, therefore, reserves full power, both under this Order, the Order to Show Cause, and the petition and motion which brought this proceeding to this hearing, and also under the Court's reservations of powers under the former orders of the Court, including but not limited to, the Order for deposit of $14,000,000.00 of assets into the registry of this Court, made March 13, 1948, the Preliminary Injunction made July 30, 1948, the Order restoring Long Beach Federal Savings and Loan Association to the possession of its officers and directors, made January 23, 1948, and also under this Court's otherwise existing general, equity, interpleader and other jurisdiction to make all necessary expedient or proper additional or later orders, decrees or judgments, either or both, enlarging or expanding the powers of said Receiver, or the extent of this Order, or modifying, vacating, or terminating the said Receivership, the said Receiver's powers, or the scope or extent of this Order; and

10. That the Orders and Injunctions of this Court heretofore made on July 30, 1948 and December 1, 1949 are hereby modified so as to permit the doing of the things permitted and directed by this Order; and

11. Nothing in the within findings, conclusions and order is or shall be deemed to be an adjudication on the final merits of any issue or issues in the within consolidated action, or on the merits or timeliness of any claims or causes of action herein authorized.

DATED at Los Angeles, California, this 15th day of March, 1952, at the hour of 8:10 o'clock P. M. of said day.

PEIRSON M. HALL

Peirson M. Hall

Judge of the U. S. District Court.

Approved as to form and 5 days Waiver under Local Rules.

RICHARD FITZPATRICK
O'MELVENY & MYERS
By JOHN WHYTE
Attorneys for Los Angeles Bank *et al.*

WESTOVER & SMITH
By WYCKOFF WESTOVER
Attorneys for Plaintiffs in 5421 P.H.

CHARLES K. CHAPMAN
Attorney for L. B. Fed. S. & L. Assn. and 1st Fed. S. & L. Assn. of Bellflower

VERNE DUSENBERY
PHILIP H. ANGELL
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Attorneys for "San Francisco Bank"

MOSE SILVERMAN
Attorney for Home Loan Bank Board *et al.*

W. I. GILBERT, JR.
Attorney for First Federal of Wilmington.

Exhibits "F" and "H" are omitted. They will be found at pages 8399 to 8525 for Exhibit "F," and 8526 to 8537 for Exhibit "H," all in record from District Court to Court of Appeals in Appeal No. 12511.

8. **Order for Interim Allowance of Costs and Expenses to Defend Appeal From Order Appointing Receiver.**

Filed Aug. 19, 1952. Edmund L. Smith, Clerk. By Theodore Hocke, Deputy Clerk.

Judgment docketed and entered Aug. 20, 1952.

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

Mallonee, *et al.*,

Plaintiffs,

vs.

Fahey, *et al.*,

Defendants.

Long Beach Federal Savings and Loan Association,
Third-Party plaintiff and Cross-claimant,

vs.

Federal Home Loan Bank of San Francisco,
Defendant, Cross-defendant,
and Third-Party Defendant.

Howard V. Calverley, Receiver, *et al.*,

Plaintiffs,

vs.

Federal Savings and Loan Insurance Corporation, *et al.*,
Defendants.

Federal Home Loan Bank of San Francisco,
Plaintiff and Cross-claimant,

vs.

Long Beach Federal Savings and Loan Association,
Defendant and Cross-Defendant, *et al.*

Civil Action No. 5421-P.H.
(and consolidated, related and enjoined Actions
No. 5678-P.H. in said Southern District,
No. 7989-W.M. in said Southern District,
No. 28203-G in the Northern District,
No. 13953-P.H. in the Southern District,
No. 13979-P.H. in the Southern District,
No. LB-C-14492 in the Superior Court of California,
No. LB-C-18144 in the Superior Court of California,
No. 597402 in the Superior Court of California.)

ORDER FOR INTERIM ALLOWANCE OF COSTS AND EXPENSES TO DEFEND APPEAL FROM ORDER APPOINTING RECEIVER.

The application and motion of Ernest R. Utley as Receiver for the Federal Home Loan Banks of San Francisco, Portland and Los Angeles, Re Receiver's Application for Costs to Defend Appeal from Order Appointing Receiver came on regularly to be heard on the 11th day of August, 1952, at 10:00 A. M.

Then appearing in Court Room Number 1, in the Federal Building in the City of Los Angeles, County of Los Angeles, State of California, were counsel representing the various parties to this litigation as follows:

1. W. I. Gilbert, Jr., Attorney for Ernest R. Utley, Receiver for the Federal Home Loan Banks of San Francisco, Portland, and Los Angeles;

2. Charles K. Chapman, Attorney for third-party plaintiff and cross-claimant, Long Beach Federal Savings and Loan Association;

3. Wycoff Westover, of the firm of Westover and Smith, attorneys for plaintiffs in action No. 5421-P.H., Shareholders' Protective Committee;

4. Walter S. Binns, U. S. Attorney, by Arline Martin, Assistant U. S. Attorney, for defendants Home Loan Bank Board, *et al.*;

5. Philip H. Angell, Robert M. Adams, Verne Dusenbery, and Jerry B. Riseley, Attorneys-at-Law, for defendant Federal Home Loan Bank of San Francisco;

6. Thomas Menzies, Attorney-at-Law, for defendant Home Indenmity Company;

7. O'Melveny & Myers and Richard FitzPatrick, by Richard FitzPatrick, Attorney-at-Law, for third-party defendant, cross-claimant and cross-defendant in Action No. 5421-P.H., and plaintiff in Action No. 5678-P.H., Federal Home Loan Bank of Los Angeles, *et al.*;

8. James T. Bradshaw, Jr., Attorney-at-Law, for defendant Joe Crail.

Said application and motion was argued by all counsel desiring to do so and having argued, counsel submitted the matter, and the court having considered the evidence, oral and documentary, and from the verified motions, affidavits and evidence (both oral and documentary), presented, and from all matters produced at said hearing and from the records, orders, judgments, pleadings, and proceedings heretofore had in the above consolidated causes, the court therefrom and from said previous hearings, findings, orders, and judgments,

NOW FINDS:

1. The court has jurisdiction of the persons and subject matter involved.

2. That notice of the time and place of hearing of Receiver Ernest R. Utley's Application and Motion for Costs to defend Appeal from Order Appointing Receiver, the method of notice, and the manner of service of such notice and motion, were all prescribed and defined by this court in its Order to Show Cause of July 14, 1952.

3. That notice was given and served as required by said Order to Show Cause. That such notice so given and served was reasonable and adequate notice to all parties concerned in the hearing of said Receiver's motion and application for costs to defend appeal.

That counsel for respondent Federal Home Loan Bank of San Francisco requested from counsel for receiver, a continuance of the time of filing the response of said Bank to said receiver's motion from the date of July 25, 1952, originally set by this court, to August 8, 1952, and the continuance of the time for hearing of said Petition and Motion from July 28, 1952, also originally set by this Court, to August 11, 1952. That such continuances were duly approved by order of this Court.

4. That on March 15, 1952, Howard V. Calverley was appointed by this court as receiver for the limited purpose of preserving property on deposit in this court and rights, claims, and liabilities, of various parties thereto or thereon, and for other purposes.

That thereafter the said Calverley resigned and this court appointed Ernest R. Utley as his successor receiver on or about the 14th day of April, 1952. That

the said Utley is now, and continues to be, such duly appointed, acting and qualified receiver.

5. That a portion of the assets on deposit in the registry of this court consists of four promissory notes of an apparent aggregate face amount of $6,300,000.00, with claimed accrued interest thereon of approximately $500,000.00. That this court deemed it advisable and necessary in the exercise of its discretion to appoint said receiver in order to preserve and otherwise to protect the said $7,000,000.00 of deposited assets, all as more fully set out in the order appointing the receiver.

6. That by failing to bring all apparently necessary actions or causes of actions, on or connected with said promissory notes and transactions and things done in connection therewith, San Francisco Bank, the named payee, has endangered, and, by said inaction, has threatened to cause said deposited promissory notes, and other causes of action, to become valueless by possible expiration or bar of the statute of limitations in the event the liabilities asserted by the receiver should be sustained. That various of the parties claim beneficial ownership in said notes or the proceeds thereof or in the money allegedly advanced for consideration of the execution of said notes.

That all of the above possible beneficial owners of said $7,000,000.00 in assets, represented by said notes and the interest thereon, were threatened and imperiled with the loss or destruction of their claims and assets by the running of the statute of limitations on said promissory notes and/or other causes of action.

7. That among the alleged insurers or others claimed to be liable for said $7,000,000.00 obligation, are Federal Savings and Loan Insurance Corporation, A. V. Ammann

as purported conservator, Home Loan Bank Board, and the various members thereof, Divers, Adams, LaRoque, Heisler, *et al.*, and others.

That said Receiver, pursuant to order of this court, has filed, commenced and brought actions, cross-claims, complaints, and other proceedings, pursuant to order of this court, naming and suing as defendants, among others, the said Federal Savings and Loan Insurance Corporation Home Loan Bank Board, Ammann, *et al.*, and others.

That such defendants claim and maintain that if the order appointing this receiver to bring said actions be void or invalid, then no actions have thereby been filed commenced or brought by such receiver.

That appellants, by said appeal, seek to vacate the order appointing said receiver, and thereby seek to terminate the action by said receiver against them and others as defendants, without decision on the merits of the allegation in said receiver's complaints and pleadings against them as defendants.

That if said receiver's actions and pleadings against them as defendants be thereby defeated, it appears probable or possible that the defendants in the actions filed by the receiver will be enabled to plead the statute of limitations successfully against the same actions later brought by any of the other parties, including San Francisco Bank, against said defendants, to enforce their said alleged liability upon the said four purported notes in face amount of $6,300,000.00, with claimed unpaid balance of $7,000,000.00.

That to rely solely upon the actions of said San Francisco Bank would or may permit or assist all or some of said defendants in said receiver's action, including Lorg

Beach Federal Savings and Loan Association, to escape possible liability and responsibility for the alleged $7,000,000.00 obligation.

8. That various of the parties to this litigation contend that all of those named as defendants in said actions filed by the receiver are, or may be, liable on said $7,000,000.00 obligation and would wholly escape all liability if said San Francisco Bank action alone is relied upon.

9. That from evidence heretofore introduced on previous hearings in the above consolidated matters, many contentions and claims are made that the said Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, *et al.*, dominate and control the said San Francisco Bank, and approve or disapprove the salaries, budgets, compensations, fees and remuneration of its officers, directors, attorneys and others.

10. That in the San Francisco Bank action on the promissory notes, numerous defendants were omitted, including the Home Loan Bank Board and Federal Savings and Loan Insurance Corporation, which omission, it is claimed, was and is by reason of the domination and control exercised over San Francisco Bank by said Home Loan Bank Board and Federal Savings and Loan Insurance Corporation.

That the expenses, fees, and costs of San Francisco Bank to prosecute the appeals heretofore taken from other orders of this court by the San Francisco Bank and from the order appointing the receiver, are approved and permitted by the Home Loan Bank Board, which was, as hereinabove stated, omitted as a defendant in the suit filed by San Francisco Bank on the promissory notes.

11. That said duly appointed receiver has filed his action in the California State Superior Court, as ordered by this court, and has also filed his cross-claim in this court, also as ordered by this court, and by said actions has apparently prevented the bar of the statute of limitations from cutting off the asserted liabilities and obligations of the defendants sued by said receiver for payment of said obligations in excess of $7,000,000.00.

That said receiver's actions are the only proceedings pending against any and all possible defendants who may be liable upon said obligations in excess of $7,000,000.00, and upon a variety of theories omitted from San Francisco Bank's action.

12. That Federal Savings and Loan Insurance Corporation in computing its insurance premiums, includes the $6,300,000.00 on deposit in court, and there has been paid, or deposited in court, about $170,000.00 premiums, based on such computation. It is claimed such insurance covers the loans sued on by the receiver.

13. That no cash or money has come into the hands of said receiver as assets of said receivership. That the necessary filing fees incurred by said receiver in fulfilling the orders of this court to bring and file said actions upon said notes in the California Superior Court against said defendants upon the said causes of actions set forth in the said Order of March 15, 1952, have been advanced by W. I. Gilbert, Jr., the court-appointed counsel for said receiver.

14. That said receiver contends that the designation of record to be printed on the appeal from the order appointing said receiver is inadequate and insufficient in that, among other things, it fails to present many neces-

sary matters to the Court of Appeals on behalf of receiver's defense of the said appeals.

That the rules of the Court of Appeals for the Ninth Circuit require that appellees who counter-designate additional portions of the record for printing must pay for said printing of such additional portions so designated by them.

That in addition thereto, said Appeals Court rules require that briefs must be printed.

That it is necessary in the fulfillment of his duties:

(a) That said receiver's defense of the order appointing him be adequately briefed and presented to the said Court of Appeals;

(b) That a proper printed record be available for the presentation of said defense; and

(c) That counsel for said receiver argue said appeal; and

(d) That filing charges be paid.

That defense against the appeal from the order appointing said receiver is necessary for the protection and preservation of the assets on deposit in the registry of this court from the possible expiration of the statute of limitations and the loss or impairment of causes of action against defendants sued by said receiver.

15. That the assets in the registry of this court include approximately $1,400,000.00 in cash, in addition to said notes in the face value of $6,300,000.00 and $5,300,000.00 in U. S. Government Treasury Bonds with attached coupons with accumulated interest of approximately $500,000.00, and interest accumulating at a rate sufficient

to offset the accumulating interest on said notes. That it is appropriate that this court make reasonable allowances from such cash to said receiver and/or receiver's attorney for the expenses of defending the appeal from this court's order appointing said receiver for the protection and preservation of said assets in the registry of this court.

16. That said receiver has estimated the cost of printing the additional portion of the record to be designated at $962.50. That said receiver has estimated cost of printing the brief on said appeal at $553.60. That said receiver reports that he has expended in connection with the filing of actions as ordered by this court, the sum of $15.00. That said receiver has estimated that it will be necessary to make one trip to appear before the Court of Appeals in connection with said appeal. That cost of said 500-mile trip from the office of Receiver's counsel in Los Angeles to San Francisco and return, including overnight stay in San Francisco, has been estimated by receiver to be $74.69.

That each of said estimated and/or expended amounts is reasonable and necessary in the performance of said receiver's duties in defending said order on said appeal.

17. That it is necessary and proper that the receiver petition the Circuit Court of Appeals for the Ninth Circuit for permission to intervene in the appeals now pending before that court, and to take such other steps as may be feasible or reasonably necessary to protect or preserve the causes of action or rights of action on behalf of the plaintiffs and against the defendants in the action filed by the receiver on certain promissory notes, as well as to protect and preserve the fund from which payment in said action ultimately may be realized.

18. That all findings of fact and conclusions of law in the order appointing the limited receiver and filed March 15, 1952, are hereby referred to, and by such reference incorporated herein as though fully set forth as findings of the court at this time.

19. That neither the U. S. Government nor any agency thereof now owns any stock in the San Francisco Bank, but said stock is wholly owned by member stockholders of said San Francisco Bank, which are savings and loan institutions, either state or federally chartered and privately owned.

20. All oral findings of fact and conclusions of law stated by the court in open court on August 11, 1952, are hereby referred to and by this reference incorporated herein as findings of fact and conclusions of law.

21. To permit any party to this litigation to defend this appeal would be to permit control of the defenses of the appeal to be in the hands of parties against whom liability is, or may be, asserted, or whose rights or liabilities may be affected, and by the making of the within order and findings and conclusions authorizing the receiver to defend said appeal, an impartial officer of the court is thereby authorized to defend said appeal in the continued assertion of possible liability on various causes of action and against many parties omitted in suits filed by the San Francisco Bank upon said notes.

22. That it appears to the court that many questions of law have arisen or may arise in connection with the order appointing the receiver, and which may or may not be determined in the appeals heretofore taken in the above consolidated matters, and any final determination as to whether such added questions are present can only be made

by an appellate court after a final determination of the pending appeals, and that to defer or delay the making of the within order for defense of the appeal by the receiver would either leave the appeal undefended in the appellate court, or would defer an ultimate decision on the validity of the order appointing the receiver until such a time as would be unwarranted delay in determining the validity, of said order appointing the receiver and possible liabilities on the suits filed by the receiver.

23. That it is contended that one question common to the appeal from the order appointing the receiver and the previously pending appeals in the above consolidated actions, is the question of jurisdiction. That unless the within order is made enlarging the powers of the receiver and authorizing him to defend said appeal and to petition the appellate court for permission to participate in the other appeals, the doctrine of collateral and other estoppel under the case of *U. S. v. Dollar*, 196 F. 2d 551 (Adv. Sh. June 30, 1952, Vol. 3), may and probably will be asserted against the receiver in the actions which he has brought.

24. All of the findings of fact heretofore found in previous orders of this court are herein again found to be true.

25. All of the findings of fact which may be found in the conclusions of law are hereby found to be true.

CONCLUSIONS OF LAW.

1. All of the conclusions of law stated in the findings of fact are herein again found to be conclusions of law whether expressly stated or not.

2. All of the conclusions of law heretofore found in the order of this court appointing said receiver, and here-

tofore found in other orders of this court, are found to be conclusions of law herein without being separately stated.

3. That the interests of justice require the advancement of costs and expenses to said Receiver for the purpose of defending the appeal against the order appointing the receiver.

4. That the interests of justice require the advancement of costs and expenses to said Receiver's attorney, W. I. Gilbert, Jr., in connection with the preparation and presentation of said matters on appeal.

5. That this Court has jurisdiction to make the within findings of fact, conclusions of law, and order.

ORDER.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Clerk of this Court is hereby ordered and directed to pay forthwith from the assets on deposit with him in the above entitled proceedings, the sum of $1605.79 to W. I. Gilbert, Jr., as attorney for said Receiver. Said sum of $1605.79 is comprised of the following items:

(a) Estimated Cost of printing additional portion of record to be designated by Receiver	$ 962.50
(b) Estimated cost of printing of brief of the receiver	553.60
(c) Estimated travel expense of receiver's counsel from Los Angeles to San Francisco and return (including overnight stay in San Francisco)	74.69

(d) Reimbursement for costs already advanced by Receiver's counsel in connection with filing of action in California State Superior Court, as ordered by this Court.... .... 15.00

TOTAL: $1605.79

Within 90 days after the spreading of the mandate on the within appeal from the order appointing Receiver, to wit: No. 13411 in the the U. S. Court of Appeals for the Ninth Circuit, the said W. I. Gilbert, Jr., shall file with the Court and serve upon all parties appellant to said appeal, his itemized accounting of expenditures made by him from the said sum of $1605.79 so paid him under this Order.

2. That the motion of Ernest R. Utley, Receiver, for permission to enlarge said Receiver's powers to include defending said Appeal No. 13411 in the United States Court of Appeals for the Ninth Circuit and all other proceedings, or otherwise connected therewith, in said Court of Appeals, the U. S. Supreme Court or elsewhere, affecting assets in the registry of this Court for the protection of which said receiver was appointed, is hereby granted, and said receiver is authorized to petition the U. S. Court of Appeals and/or the U. S. Supreme Court, and to participate as a party appellee, petitioner for certiorari, appellant, or otherwise, in all of said presently pending appeals in the U. S. Court of Appeals for the Ninth Circuit, as described in said motion, to wit:

(a) Fahey, *et al.*, vs. Mallonee, *et al.*, No. 12511, commenced December 29, 1949, by Fahey, *et al.*, and January 5, 1950, by San Francisco Bank, *et al.;*

(b) Fahey, *et al.*, vs. Ronald Walker, Special Master of the United States District Court, No. 12575, presently pending appeal from order allowing fees to Special Master, taken May 3-5, 1950;

(c) Fahey, *et al.*, vs. O'Melveny & Myers, *et al.*, No. 12591, presently pending appeal from order allowing attorneys' fees, taken June 20, 1950;

(d) Fahey, *et al.*, vs. Ronald Walker, Special Master of the United States District Court, No. 12575, presently pending appeal from order allowing fees to Special Master, taken about November 28, 1950 and December 8, 1950;

(e) Fahey, *et al.*, vs. Ronald Walker, Special Master of the United States District Court, No. 12893, presently pending appeal from order allowing fees to Special Master, taken February, 1951;

(f) Fahey, *et al.*, vs. Ronald Walker, Special Master of the United States District Court, No. 13055, presently pending appeal from order allowing fees to Special Master, taken about May 23, 1951; and

(g) Fahey, *et al.*, vs. Howard V. Calverley, Receiver, No. 13411, taken March 18, 1952.

3. The Court hereby specifically reserves power and jurisdiction to hear and determine, in adversary proceedings or otherwise, any and all petitions and motions for determination, fixing allowance, allocation, assessment or apportionment of said costs and expenses of said Receiver for or against any or all of the parties as in its discretion it may deem advisable or appropriate.

The Court hereby reserves power to make such further determinations or orders of allowances or disallowances of such matters or items with respect to costs and expenses of said Receiver in this litigation that it may hereinafter determine to be proper and just.

Notwithstanding the foregoing reservation as to further or additional allowances on account of expenses and costs of said Receiver, the sums herein ordered paid on account of allowances of costs and expenses of said Receiver and his counsel are a final judgment of this Court and as contemplated by Rule 54(b) F. R. C. P., subject to appeal as such. The Court hereby expressly determines that there is no just reason for delay in decision of the matters herein contained and expressly directs the entry of the judgment contained herein.

Dated: This 18th day of August, 1952.

/s/ PEIRSON M. HALL,
PEIRSON M. HALL,
Judge of the United States District Court.

Office - Supreme Court, U.
FILED
MAR 14 1953
HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

October Term, 1952

No. 658

JOHN D. WILLHOIT,

Petitioner,

vs.

JOHN H. FAHEY, *et al.*, and FEDERAL HOME LOAN BANK OF SAN FRANCISCO,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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Attorney for Petitioner, John D. Willhoit.

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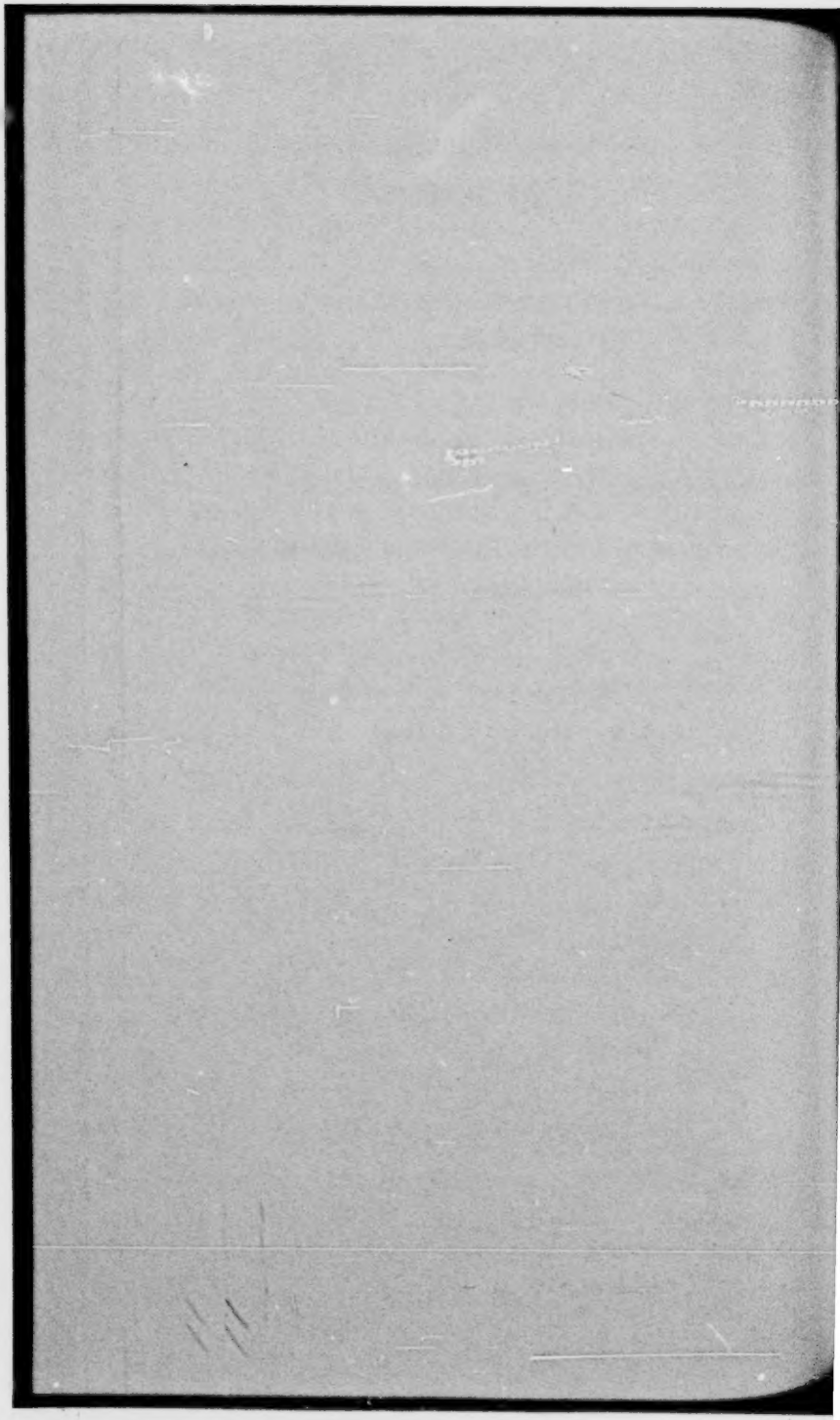

SUBJECT INDEX

PAGE

Petition for Writ of Certiorari 1

Statement of matters involved 2

Jurisdiction 10

Questions presented 10

Reasons relied on for granting the writ 11

Brief in Support of Petition for Writ of Certiorari 15

Opinions of the court below 15

Jurisdiction 16

Statement of the case 16

Specification of errors 17

Statutes involved 17

Argument 18

1. Jurisdiction of District Court 18

2. District Court entered final judgment January 23, 1948 19

Determination of issues 19

Comparative analysis 20

Home Loan Bank Board Order 388 and final judgment thereon 21

No appeal from judgment 22

3. Final judgment was res adjudicata 23

Right to intervene 23

Conclusion 24

TABLE OF AUTHORITIES CITED

CASES

Fahey, et al. v. Mallonee, et al., 332 U. S. 245, 91 L. Ed. 2030 ..... 6, 10, 11, 17, 18, 19, 24

Fahey, Ex parte, 332 U. S. 258, 91 L. Ed. 2041 ..... 6, 10

Far East Conference v. United States, 342 U. S. 570, 96 L. Ed. 390, 72 S. Ct. 492 18

General American Tank Car Corp. v. El Dorado T. Co., 308 U. S. 422, 84 L. Ed. 261, 60 S. Ct. 331 18

Mitchell Coal & Coke Co. v. Pennsylvania R. R. Co., 230 U. S. 247, 33 S. Ct. 916, 57 L. Ed. 1472 18

Stoll v. Gottlieb, 305 U. S. 165, 59 S. Ct. 137, 83 L. Ed. 104 23

System Federation No. 91 Ry., an Employees Department; A. F. of L. v. Reed, et al., 180 F. 2d 991 23

Treives v. Sunshine Mining Co., 308 U. S. 66, 60 S. Ct. 44, 84 L. Ed. 85 23

STATUTES

Federal Rules of Civil Procedure, Rule 23 23

Federal Rules of Civil Procedure, Rule 24 23

Federal Rules of Civil Procedure, Rule 54(b) 17, 19

Federal Rules of Civil Procedure, Rule 73(a) 17, 22

Federal Rules of Civil Procedure, Rule 73(b) 17, 23

Rules and Regulations for Federal Savings and Loan System, Regulation 148.4 ..... 20, 21

United States Code, Title 5, Sec. 1001 17

United States Code, Title 5, Sec. 1004(a) 17

United States Code, Title 5, Sec. 1009(c) 17

United States Code, Title 5, Sec. 1011 17

United States Code, Title 12, Sec. 1421 17

United States Code, Title 28, Sec. 380(a) 6

United States Code Annotated, Title 28, Sec. 1204(1) 10, 16

United States Code Annotated, Title 28, Sec. 1253 ..... 10, 16

IN THE

Supreme Court of the United States

October Term, 1952

No. .....

JOHN D. WILLHOIT,

Petitioner,

vs.

JOHN H. FAHEY, *et al.*, and FEDERAL HOME LOAN BANK OF SAN FRANCISCO,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

John D. Willhoit prays that writs of certiorari issue to review the orders and judgments entered November 13, 1952, in Appeal No. 12511, and December 19, 1952, in Appeal No. 12591, in the United States Court of Appeals for the Ninth Circuit, entitled:

APPEAL NO. 12511.

HOME LOAN BANK BOARD, *et al.*,

Appellants,

vs.

MALLONEE, *et al.*,

Appellees,

and

APPEAL NO. 12591.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,
Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,
Appellees,

Petitioner respectfully represents:

Statement of Matters Involved.

On November 7, 1947, by order of the United States District Court for the Southern District of California, the actions giving rise to the above entitled appeals were consolidated for all purposes.

This petition arises from petitioner's intervention action to enforce a United States District Court final judgment for accounting whereby petitioner seeks to recover original tax records, his personal property, which were illegally seized and suppressed by respondents. The records are now urgently needed for introduction in evidence in a United States Tax Court proceeding involving illegal claims for unowed income taxes asserted against petitioner and his wife by Commissioner of Internal Revenue.

Willhoit is a shareholder in, and borrower from, Long Beach Federal Savings and Loan Association, hereinafter referred to as Association [WR 15].[1]

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[1]Because other petitioners filed a printed record in this case, and for convenience of the Court, certain petitioners also filed a printed "Combined Appendix to Certiorari Petitions of Certain Petitioners," those records are consolidated with petitioner's printed record. Reference symbols to each record caption are as follows:

Other petitioners' record	R.
"Combined Appendix * * *"	Appx.
Petitioner Willhoit's record	WR

Association was seized on May 20, 1946, by virtue of Home Loan Bank Administration Order No. 5254 of May 20, 1946, which among other things provided:

1. A. V. Ammann is appointed Conservator for Association.
2. Take possession of Association.
3. Conserve Assets.
4. Assume and perform all duties and responsibilities imposed by law, Rules and Regulations for Federal Savings and Loan System.
5. Assume and perform all duties imposed by orders issued by Federal Home Loan Bank Administration or otherwise (Appx. 32).

Association was seized by respondents pursuant to said Order 5254 on May 20, 1946, by Ammann, Conservator. At that time Ammann took physical possession of the premises, the going business, assets, and all books, papers and records relating to the business. Among items so seized were petitioner's original cancelled checks, files, receipts, vouchers and other writings, which were petitioner's original income tax records relating to his financing, invested capital, land, labor and material costs, sales records, installment collections of principal and interest, defaults, collateral security, and full and complete assignments arising from the construction and sales of more than 1,000 homes built by petitioner and financed by Association [WR 8-12].

At the time of the seizure, said Association also had in its possession Willhoit contracts for sale of real property, notes, deeds of trust, and other assets aggregating in excess of $2,650,000.00. Such assets were entrusted

and assigned to said Association by Willhoit for collection and other purposes for Willhoit's indebtedness to said Association. Association acted in a fiduciary capacity for the benefit of Willhoit.

Immediately following the seizure of the petitioner's tax records, such records were maliciously and fraudulently withheld and suppressed by respondents in violation, fraudulent misuse and malicious abuse of their positions of official and public trust [WR 28], for the express purpose of causing petitioner to be indicted, prosecuted and convicted for income tax evasion, a crime which he did not commit [WR 36].

Petitioner's seized records were never returned by respondents to said Association or to the petitioner, except that 135 original cancelled checks, evidencing the payment of $1,036,000.00, which were, in 1952, recovered by petitioner from respondents as a result of his intervention action in the United States District Court. These checks were removed from Association between May 20, 1946, and January 23, 1948 [WR 76].

Subsequent to seizure, Internal Revenue, and Special Intelligence Agents conducted an examination of petitioner's income tax returns at the behest of certain Home Loan Bank Board officials and other persons [WR 22], who by means of a fraudulent and malicious conspiracy against petitioner were attempting to cause petitioner to be indicted for income tax evasion, in the District Court for the Southern District of California [WR 17-24].

Because the petitioner's seized records were suppressed by some of the respondents, who are named in the complaint in intervention [WR 17], the examination of the petitioner's income tax returns, was conducted without

the Internal Revenue Agents and the Special Intelligence Agents giving petitioner credit for capital invested in his subdivision projects financed by Association. Their reports were prepared accordingly and as a result of such reports, the Commissioner asserted claims against the petitioner and his wife for taxes, fraud penalties and interest in a sum exceeding $250,000.00. However, the conspiracy plan to cause the indictment of the petitioner failed when on December 3, 1948, by telegram, Walter M. Campbell, Regional Counsel, Bureau of Internal Revenue, San Francisco advised Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, that the Willhoit case would not be presented to the grand jury [WR 23].

Following the asserted tax claims, the petitioner and his wife filed proceedings in the United States Tax Court in which they, and each of them, deny income tax and fraud liabilities. Those cases are now pending trial in the United States Tax Court [WR 14].

In the absence of their seized tax records, petitioners are unable to defend in the Tax Court or elsewhere against claims for unowed income taxes, fraud penalties and interest [WR 14].

Since 1946, your petitioner made continuous oral and written demands to the Conservator and other officials for the return of his tax records. Each demand was refused [WR 36].

After the tax cases were filed in the United States Tax Court, petitioner filed a complaint in intervention praying for an accounting from Conservator and the return of his seized tax records. Following the filing of the complaint in intervention, the United States Attorney produced in Court and delivered to the Special Master

135 of petitioner's original cancelled checks representing the total amount of $1,036,000.00, which checks were seized and removed or caused to be removed, by respondents, from Association some time between the date of seizure, May 20, 1946, and January 23, 1948, the date of judgment in the District Court [WR 76].

The petitioner intervened in the original class action commenced by Mallonee, *et al.*, as a Shareholders' Protective Committee, on behalf of the class of all 16,000 shareholder depositors of the seized Association. Petitioner Willhoit is one of that class on whose behalf said original action was so commenced in 1946 [WR 44].

In September, 1946, a statutory three-judge court, under Title 28 U. S. C., Section 380(a), entered summary judgment against respondents and in favor of Mallonee, *et al.*, ordering such accounting and the return of the seized Association and its assets.

Respondents appealed that judgment to this United States Supreme Court, and in 1947, in *Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030, and *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041, that Court reversed the summary judgment and remanded the case to the District Court. When the case was remanded new members of reorganized Home Loan Bank Board terminated the conservatorship and sought to end the pending litigation in the District Court by adopting a resolution rescinding seizure Order 5254. This resolution in the form of an order was designated Order 388, dated January 17, 1948, which provided [R. 8231]:

1. That Order 5254 appointing Conservator be rescinded.

2. That Conservator deliver assets, books and records to Association.
3. That Conservator is directed to make full and complete accounting to shareholders.
4. That a copy of such accounting be filed with District Court.
5. That Conservator is directed to make records available for inspection by representative of District Court.
6. That copy of this resolution be delivered to District Court.
7. That a copy of this order be delivered to counsel of record in District Court cases.

Order 388 terminated all matters pending before Home Loan Bank Board.

The District Court, when Order 388 was filed, entered a judgment on January 23, 1948 [R. 8310], approving, confirming, interpreting and reciting the provisions of Order 388 as follows:

1. That the Conservatorship is rescinded and terminated.
2. That Conservator deliver assets, books and records to Association.
3. That Conservator make full and complete accounting to shareholders.
4. That copy of such accounting be filed with District Court.

5. That a Special Master be appointed.
6. That special election of Directors be held at meeting of shareholders and members.
7. The Court retained jurisdiction of the action.

This judgment approved as to form, by the parties thereto, as evidenced by signatures of counsel for the parties appearing on said judgment became final for appeal purposes on April 25, 1948.

No appeal was ever taken from that judgment. Thus the conservatorship was terminated by resolution and formal Order 388 of Home Loan Bank Board, and final judgment of District Court. Thereafter nothing remained to be done by the parties except the preparation and filing of accounting, and performance of the judgment which provided mechanical means for delivery of assets and records to Association.

Following entry of judgment, the appellants filed two accounts. The first was rejected by the court, and the second is pending.

Other issues arose in the main case after the judgment of January 23, 1948, became final. An injunction issued on December 1, 1949, restraining a second seizure of Association. From that judgment of injunction the respondents appealed to the Court of Appeals almost two years after the entry of petitioners' judgment for accounting. No appeal was ever taken from the accounting judgment.

On October 30, 1952, four and one-half years after the accounting judgment became final, the Court of Appeals issued an *ex parte* order, on motion of respondents, staying all proceedings in the District Court in the consolidated actions 5421-PH and 5678-PH and in all interventions and interpleaders and removed actions relating to said consolidated actions until further order of Court of Appeals [WR 88]. A hearing on the motion was held on November 24, 1952, at which time the *ex parte* order staying all proceedings became final [WR 114].

The stay order prevents the petitioner from enforcing the final judgment for accounting, and it deprives him of the right to enforce the return of his own tax records. He is now defenseless in the Tax Court against claims for unowed taxes, interest and penalties of $250,000.00.

The petitioner was not a party to either appeal numbers 12511 or 12591 in the Court of Appeals.

Petitioner is now in the anomalous position of being between the cross-fire of two government agencies, the Commissioner of Internal Revenue on the one hand, who claims unowed taxes, fraud penalties and interest, and Home Loan Bank Board representatives, who on the other hand, refuse to return the suppressed original tax records which would establish a good and meritorious defense to the claims for taxes.

The petitioner petitions this Honorable Court for relief, to have the stay order vacated, and the cases remanded to the District Court for trial on the merits.

Jurisdiction.

1. Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by:

(a) 28 U. S. C. A., Sec. 1204(1);

(b) 28 U. S. C. A., Sec. 1253.

2. The dates of the opinions to be reviewed are:

(a) As to Appeal 12511, April 2, 1952, rehearing denied December 13, 1952;

(b) As to Appeal 12591, November 6, 1952, rehearing denied December 17, 1952.

3. The date within which to file petition for certiorari was extended to and including March 17, 1953, by order of this Court. The Court added to the order the proviso, "providing the petitioner has standing to file a petition for certiorari." Petitioner responds to the order proviso by reference to this section of petition, and "Statement of Matters Involved." The petitioner has been deprived of a final judgment in his favor from which no appeal was ever taken to recover privately owned property, and due process, by opinions and orders of Court of Appeals.

Questions Presented.

1. Can Court of Appeals order dismissal of an action as beyond the jurisdiction of the District Court over the subject matter, where a mandate (2302-2304) of the Supreme Court directing further proceedings resulted in final judgment? See *Fahey v. Mallonee*, 332 U. S. 245, 91 L. Ed. 2030, and *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041.

2. Can a plaintiff in intervention in whose favor a final class judgment was entered for a return of, and account-

ing for property seized by Conservator of Home Loan Bank Board, be prevented from enforcing said final judgment by a stay order issued by Court of Appeals in an appeal, where the plaintiff in intervention is not a party, and where no appeal was taken from the final judgment in favor of plaintiff in intervention?

3. Can final administrative order issued by Home Loan Bank Board for accounting and return of seized assets by a Conservator be enforced by a consent judgment in the District Court, where the District Court entered such consent judgment approving and confirming said order of Home Loan Bank Board?

4. Whether a Court of Appeals can stay proceedings in a District Court action to enforce a final judgment for accounting and return of seized property from which no appeal was ever taken?

Reasons Relied on for Granting the Writ.

1. The Court of Appeals opinions are the first decisions involving the rights of millions of shareholders and borrowers in Federal Savings Associations to an accounting for their property and savings, seized under Federal law.

2. In reliance on the mandate of the United States Supreme Court in the case of *Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030, upon final administrative order of respondents, the District Court entered its final judgment requiring return of the seized property and an accounting. This class judgment in favor of 24,000 shareholders and borrowers is swept aside by the Court of Appeals without any appeal ever having been taken from that final judgment.

For years, petitioner and the 24,000 shareholders and borrowers, relied on the final District Court judgment requiring an accounting for their seized property. Statutes of limitation have expired against the rights for independent recovery in other actions. After such expiration, the Court of Appeals, four and one-half years after the accounting judgments became final, ordered dismissal of the proceedings in which the judgments were entered.

If such Court of Appeals opinions become final, the faith of the public in the safety of their deposited savings will be shattered. If Federal officials, who seized the people's savings, property, and tax records, cannot be required to observe final administrative orders and Federal Court judgments, both requiring restoration of the seized property, and accounting therefor, the public dare not further entrust their savings and property to Federal Savings Associations.

In faith and reliance upon the Federal Savings System, approximately 16,000 Federal Savings Associations have been created throughout the United States. Their savings deposits and loans exceed $10,000,000,000.00.

3. By the Court of Appeals opinions, Home Loan Bank Board Conservators can seize any or all such Associations and assets, and can never be held to account for what they seized, or what was done with the seized savings. Final judgments of the courts, and final administrative orders, become worthless scraps of paper, unen-

forceable against respondents who expressly consented to the orders and judgments for the return of the seized assets and the accounting therefor.

A supporting brief accompanies this petition.

Wherefore, the petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this honorable court directed to the Court of Appeals for the Ninth Circuit for that court to certify and send to this court for its review and determination a full and complete transcript of the record below, and that the decisions of the Court of Appeals be reversed and that petitioner have such other and further relief as may be just.

Respectfully submitted,

EMMETT E. DOHERTY,

Attorney for Petitioner, John D. Willhoit.

IN THE

Supreme Court of the United States

October Term, 1952

No. .....

JOHN D. WILLHOIT,

Petitioner,

vs.

JOHN H. FAHEY, *et al.*, and FEDERAL HOME LOAN BANK OF SAN FRANCISCO,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Court Below.

The preliminary injunction with findings made by the District Court comprises Volume XVIII in other petitioners printed record. It contains a comprehensive history of the litigation.

The opinion of the Court of Appeals in Appeal No. 12511 is reported in 196 F. 2d 336, and also printed in the Record from Court of Appeals, page 11503.

The opinion of the Court of Appeals in Appeal No. 12591 has not yet appeared in the Federal Reporter as

of the date hereof but copies of that printed opinion have been filed with the record in connection with the various petitions herein filed by other petitioners.

Jurisdiction.

1. Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by:

(a) 28 U. S. C. A., Sec. 1204(1);

(b) 28 U. S. C. A., Sec. 1253.

2. The dates of the opinions to be reviewed are:

(a) As to Appeal 12511, April 2, 1952, rehearing denied December 13, 1952.

(b) As to Appeal 12591, November 6, 1952, rehearing denied December 17, 1952.

3. The date within which to file petition for certiorari was extended to and including March 17, 1953, by order of this Court. The Court added to the order the proviso, "providing the petitioner has standing to file a petition for certiorari." Petitioner responds to the order proviso by reference to this section of petition, and "Statement of Matters Involved." The petitioner has been deprived of a final judgment in his favor from which no appeal was ever taken to recover privately owned property, and due process, by opinions and orders of Court of Appeals.

Statement of the Case.

A statement of the matter involved has already been made in the preceding petition, pages 2 to 9. This statement is hereby adopted and made a part of this brief.

Specification of Errors.

1. The Court of Appeals erred in reversing the judgment of the District Court which held that the District Court had jurisdiction over persons and subject matter involved.

2. The Court erred in holding that the District Court was without jurisdiction and should have dismissed the case after the mandate in *Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030, was spread on the minutes of the Court.

3. The Court erred in issuing an order staying proceedings in a District Court action to enforce a final judgment for accounting and return of seized property from which no appeal was ever taken.

Statutes Involved.

Pertinent provisions of Federal Home Loan Bank Act, 12 U. S. C. 1421.

Federal Rules of Civil Procedure, Sections 54(b), 73(a) and 73(b).

Administrative Procedure Act, 5 U. S. C., Sections 1001, *et seq.*, 1004(a), 1009(c), 1011.

ARGUMENT.

1. Jurisdiction of District Court.

The Court of Appeals held that the District Court should have dismissed the actions for lack of jurisdiction when the Supreme Court upheld the validity of Home Owners Loan Act of 1933, and remanded the case to the District Court. This holding is in conflict with Supreme Court cases.

The mandate in *Fahey v. Mallonee,* 332 U. S. at 257, 91 L. Ed. 2030, remanded the case to the District Court with power to try the issues.

Where a District Court had jurisdiction of the subject matter and the parties, and in the course of litigation an administrative problem arose, the action in the District Court should be stayed pending the conclusion of the administrative proceeding. This principle of procedural law has been upheld by the Supreme Court in:

Far East Conference v. United States, 342 U. S. 570, 96 L. Ed. 390, 72 S. Ct. 492;

General American Tank Car Corp. v. El Dorado T. Co., 308 U. S. 422-433, 84 L. Ed. 261, 60 S. Ct. 331;

Mitchell Coal & Coke Co. v. Pennsylvania R. R. Co., 230 U. S. 247, 33 S. Ct. 916, 57 L. Ed. 1472.

The Court of Appeals erred in holding that the District Court should have dismissed the case after the mandate in *Fahey v. Mallonee, supra,* was spread on the minutes.

2. District Court Entered Final Judgment January 23, 1948.

In May, 1946, Mallonee, *et al.*, commenced a class action on behalf of 16,000 depositor shareholders against respondents. The relief prayed for was an accounting for the seized $26,000,000.00 of depositors' savings, and approximately $4,000,000.00 of trustee collections. More than $2,500,000.00 of such seized trustee collection items arise from petitioner's contracts for sale of homes, together with all original books, records and accounts concerning same [WR 44]. All such records, papers and documents were the privately owned property of petitioner Willhoit.

After remand from Supreme Court in the case, *Fahey v. Mallonee*, 332 U. S. 245, 91 L. Ed. 2030, 67 S. Ct. 1559, and the filing of Home Loan Bank Board Order 388, the District Court entered a final judgment for return of assets, records, documents and accounting on January 23, 1948. The form of judgment complied with FRCP 54(b) as it then existed. Since that date Section 54(b) has been amended.

The Court had authority to enter a final judgment at any stage upon determination of the issues material to that particular claim, FRCP 54(b).

Determination of Issues.

The issues terminated by the judgment were determined by Home Loan Bank Board in Order 388. This was a lawful order discharging the Conservator and returning Association to its management, and restoring the rights, powers and privileges of its officers and directors in manner provided by law and regulations. Rules

and Regulations for Federal Savings and Loan System § 8.4 provides for the discharge of a Conservator as follows:

> "An order of the Home Loan Bank Board discharging a conservator and returning the Association to its management shall restore to such Federal association all its rights, powers and privileges and shall restore the rights, powers and privileges of its officers and directors, all as of the time specified in such order, except as such order may otherwise provide."

Order 388 provided the mandatory provisions of the judgment. This final action of the Home Loan Bank Board in discharging the Conservator, returning Association to its management and restoring the rights, powers and privileges of its officers and directors was recited in the mandate provisions of the judgment. For convenience, the following comparative analysis of Order 388 and Judgment are presented:

Comparative Analysis.

ORDER.	JUDGMENT.
1. Order 5254 appointing conservator rescinded.	1. Conservatorship is rescinded and terminated.
2. Conservator deliver assets, books and records to Association.	2. Conservator deliver assets, books and records to Association.
3. Conservator directed to make full and complete accounting to shareholders.	3. Conservator directed to make full and complete accounting to shareholders.
4. Copy of accounting be filed with District Court.	4. Copy of accounting be filed with District Court.

ORDER.	JUDGMENT.
5. Executory provisions for purpose of accomplishing mandates 1, 2, 3 and 4, set forth above in this column.	5. Executory provisions for purpose of accomplishing mandates 1, 2, 3 and 4, set forth above in this column.

Home Loan Bank Board made final termination of all issues relating to Order 5254 conservatorship in manner authorized by Reg. 148.4, *supra,* while the District Court entered judgment thereon. Thus all conservatorship issues were terminated in final form by Home Loan Bank Board and the District Court.

The Court rejected the first accounting and objections to the second accounting have not yet been decided by the Court.

Order 388 has not been enforced. Neither has the judgment. Court of Appeals stay order [WR 114] precludes petitioner from enforcing accounting judgment in his favor.

Home Loan Bank Board Order 388 and Final Judgment Thereon.

The judgment of January 23, 1948, was final and appealable as to termination of conservatorship and restoration of management to Association.

This point is established without fear of controversy by quoting from respondents (the then appellants) brief, page 34 in Appeal No. 12511 as follows:

> "The order of January 23, 1948, insofar as it terminates the conservatorship, was final, and, no

appeal having been filed within the time allowed, the propriety thereof is no longer open for consideration.[4]

Accordingly the court order which transferred management and terminated the conservatorship effective January 24, 1948, was final and appealable when entered on January 23, 1948, although the accompanying order for an accounting was interlocutory. *Radio Station WOW Inc. v. Johnson,* 326 U. S. 120; *Bank of Lewisburg v. Scheffey,* 140 U. S. 445.

After Mr. Justice Frankfurter stated in *Republic Natural Gas Co. v. Oklahoma,* 334 U. S. 62, 68; * * * Four related reasons, an order decreeing immediate transfer of possession of physical property is final for purposes of review even though an accounting for profits is to follow. In such cases the accounting is deemed a severed controversy and not part of the main case * * *."

No Appeal From Judgment.

No appeal was taken from the judgment of January 23, 1948.

For appeal purposes the judgment became final on April 25, 1948. (FRCP 73(a).)

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[4]The court order of January 23, 1948, which transferred the management to the former directors of the Association, was entered in a collateral proceeding on a petition for "an order of court approving, confirming and interpreting" Board Order No. 388. [R. 10304.]

On December 1, 1949, respondents filed Notice of Appeal from a judgment of injunction in this action. The notice designated the judgment appealed from.

The decision and order of Court of Appeals staying the judgment of January 23, 1948, is in error because no appeal was ever taken from that judgment by designating it in the notice of appeal. A notice of appeal must designate the judgment appealed from. (FRCP 73(b).)

3. Final Judgment Was Res Adjudicata.

A final judgment of a District Court holding that the Court has jurisdiction of persons and subject matter involves is *res adjudicata* and cannot be reviewed on subsequent appeals. (*Treives v. Sunshine Mining Co.*, 308 U. S. 66, 60 S. Ct. 44, 84 L. Ed. 85; *Stoll v. Gottlieb*, 305 U. S. 165, 59 S. Ct. 137, 83 L. Ed. 104.)

The Court of Appeals erred in holding that a final judgment of the District Court deciding that the Court had jurisdiction of the persons and subject matter involved is not conclusive.

Right to Intervene.

Petitioner has a right to intervene in an action to enforce final judgment in favor of a class in which he is a member where the District Court granted a motion for leave to intervene FRCP 23, 24. (*System Federation No. 91 Ry., an Employees Department; American Federation of Labor v. Reed, et al.*, 180 F. 2d 991.)

INDEX

	Page
Opinions below	1
Jurisdiction	3
Questions presented	3
Statutes and regulations involved	5
Statement	5
1. The Federal Home Loan Bank System	6
2. The administrative actions underlying the litigation	10
a. The readjustment of the Federal Home Loan Bank districts on the Pacific coast	10
b. The appointment of a conservator for Long Beach Federal Building and Loan Association	11
3. The proceedings in the Long Beach litigation	13
a. The original complaints	13
b. Various interpleaders	14
(i) Title Service Company	14
(ii) Wallis interpleader	15
(iii) Turner interpleader	16
(iv) The interpleading of the Federal Savings and Loan Insurance Corporation	17
c. Service on non-resident defendants	17
d. The first injunction proceedings	17
e. Proceedings immediately subsequent to the decision in *Fahey* v. *Mallonee*, 332 U.S. 245	18
f. Termination of the conservatorship	21
g. The San Francisco impound	22
h. Summary of the complaints as they now stand	23
i. The injunction under review in the Court of Appeals	25
j. The Court of Appeals' decision	27
Argument	28
a. The demands for damages	35
b. The prayer for a declaratory judgment	37
Conclusion	46

CITATIONS

Cases:

Adams v. *Home Owners' Loan Corporation*, 107 F. 2d 139	36
Adams v. *Nagle*, 303 U.S. 532	41
Aircraft & Diesel Corp. v. *Hirsch*, 331 U.S. 752	40
Andersen v. *Albert & J. M. Anderson Mfg. Co.*, 325 Mass. 343	33
Atchley v. *Tennessee Valley Authority*, 69 F. Supp. 952	37
Bailey v. *McLellan*, 159 F. 2d 1014	34
Baker v. *Schofield*, 243 U.S. 114	42

Cases—Continued

Page

Bankers Trust Co. v. *Texas & Pacific Ry. Co.*, 241 U.S. 295 46
Barsky v. *United States*, 167 F. 2d 241, certiorari denied, 334 U.S. 843 36
Blackmar v. *Guerre*, 342 U.S. 512 ..... 2, 42, 44
Bushnell v. *Leland*, 164 U.S. 684 41
Carlisle v. *Smith*, 234 Fed. 759 33
Casey v. *Galli*, 94 U.S. 673 41
Clarke v. *Boysen*, 39 F. 2d 800, certiorari denied, 282 U.S. 869 43
Cocke v. *Halsey*, 16 Pet. 71 ..... 38, 41
Cooper v. *O'Connor*, 99 F. 2d 135 36
County of Ralls v. *Douglass*, 105 U.S. 728 38
Dan Cohen Realty Co. v. *National Savings & Trust Co.*, 125 F. 2d 288 43
Deckert v. *Independence Corp.*, 311 U.S. 282 32
Ex Parte Fahey, 332 U.S. 258 ..... 3, 37
Fahey v. *Mallonee*, 332 U.S. 245, 3, 7, 9, 12, 17, 18, 23, 29, 32, 34, 37, 39, 40
Far East Conference v. *United States*, 342 U.S. 570 ..... 39, 45
Federal Land Bank v. *Bismarck Co.*, 314 U.S. 95 36
Federal Land Bank v. *Priddy*, 295 U.S. 229 ..... 36, 37
Findlay v. *Florida East Coast Ry. Co.*, 68 F. 2d 540, certiorari denied, 292 U.S. 623 43
French v. *Armstrong*, 79 N.J. Eq. 289 33
General Investment Co. v. *Lake Shore Ry.*, 260 U.S. 261 43
Goldsmith v. *Board of Tax Appeals*, 270 U.S. 117 39
Great Lakes Auto Insurance Group of Chicago v. *Shepherd*, 95 F. Supp. 1 43
Greenfield Savings Bank v. *Abercrombie*, 211 Mass. 252 33
Gregoire v. *Biddle*, 177 F. 2d 579, certiorari denied, 339 U.S. 949 36
Hagan v. *Central Avenue Dairy*, 180 F. 2d 502 43
Huntington v. *National Savings Bank*, 96 U.S. 388 33
Hutchins v. *Pacific Mutual Life Ins. Co. of California*, 20 F. Supp. 150, affirmed, 97 F. 2d 58 38
Isbrandtsen-Moller Co. v. *United States*, 300 U. S. 139 34
Jones v. *Kennedy*, 121 F. 2d 40, certiorari denied, 314 U.S. 665 36
Kennedy v. *Gibson*, 8 Wall. 498 41
Ladew v. *Tennessee Copper Co.*, 218 U.S. 357, affirming 179 Fed. 245 43
Larson v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 ..... 35, 36, 41
Lichter v. *United States*, 334 U.S. 742 ..... 40, 45
Lucking v. *Delano*, 122 F. 2d 21 37
Macauley v. *Waterman SS Corp.*, 327 U.S. 540 39
McDowell v. *United States*, 159 U.S. 596 38

Cases—Continued

	Page
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41	31, 39, 45
Non-Magnetic Watch Co. v. *Association Horlogere*, 44 Fed. 6	43
North Carolina RR v. *Story*, 268 U.S. 288	31
Norton v. *Shelby County*, 118 U.S. 425	38
Orth v. *Transit Inv. Corporation*, 132 F. 2d 938	32
Radio Station WOW Inc. v. *Johnson*, 326 U.S. 120	37
Red River Broadcasting Co. v. *Federal Communications Commission*, 98 F. 2d 282, certiorari denied, 305 U.S. 625	39
Republic Gas Co. v. *Oklahoma*, 334 U.S. 62	37
Rockingham County v. *Luten Bridge Co.*, 35 F. 2d 301	38
Rogers v. *Hill*, 34 F. Supp. 358	34
Spalding v. *Vilas*, 161 U.S. 483	35
Texas v. *Interstate Commerce Comm.*, 258 U. S. 158	46
United States v. *Jones*, 336 U.S. 641	40
United States v. *Morgan*, 313 U.S. 409	35
United States v. *Rock Royal Co-op.*, 307 U.S. 533	34
United States v. *U. S. Smelting Co.*, 339 U.S. 186	37
United States Savings Bank v. *Morgenthau*, 85 F. 2d 811, certiorari denied, 299 U.S. 605	41
Vidal v. *South American Securities Co.*, 276 Fed. 855	43
Village of Brookfield v. *Pentis*, 101 F. 2d 516	42
Waite v. *Santa Cruz*, 184 U. S. 302	38, 41
Wilhelm v. *Consolidated Oil Corp.*, 84 F. 2d 739	43
Yakus v. *United States*, 321 U.S. 414	40, 45

Statutes and Regulations:

Act of July 14, 1952, 66 Stat. 604	44
Administrative Procedure Act, 60 Stat. 237:	
Sec. 10	44
Sec. 10(e)	44
Federal Home Loan Bank Act of 1932, 47 Stat. 725	6
Sec. 3	7, 10
Sec. 4(a)	7
Sec. 6(a)	8
Sec. 6(c)	7
Sec. 6(f)	8
Sec. 7	8
Sec. 12	8
Sec. 13	8
Sec. 14	8
Sec. 17	2, 6, 7, 8
Sec. 25	8, 10
Sec. 26	8, 10
Home Owners' Loan Act of 1933, 48 Stat. 128	6
Sec. 5	4

Statutes and Regulations—Continued

	Page
Sec. 5(a)	9
Sec. 5(d)	9, 18
Sec. 5(f)	9
Sec. 5(g)	9
Sec. 5(h)	9
Judiciary Act of 1789, Sec. 11 (1 Stat. 79)	43
National Housing Act of 1934, Title IV, 48 Stat. 1255-1261	6
Sec. 402	7
Sec. 402(a)	10
Sec. 403(a)	10
Sec. 405	10, 45
Public Utility Act of 1935, Sec. 2(a)(7), (8) (11); 49 Stat. 803, 806-807, 808; 15 U.S.C. 79b(a)(7), (8), (11)	32
Reorganization Plan No. 3 of 1947, 61 Stat. 954	2, 7, 10
R.S. 361 (5 U.S.C. 306)	1
28 U.S.C.:	
Sec. 1332	46
Sec. 1335	17, 43, 45
Sec. 1391	43
Sec. 1392	43
Sec. 1655	17, 42
Sec. 2361	17, 43, 45
N. Y. General Corporation Law, Secs. 63, 67	34
24 C.F.R. (Cum. Supp. 1944):	
Sec. 206.2	38
Sec. 206.4	12
Sec. 207.3	12
Sec. 208.3	12
24 C.F.R. (Pocket Supp. 1952):	
Sec. 144.1(4)	11
Sec. 145.21	25
Sec. 145.22	25
Sec. 145.23	25
Sec. 148.2	20, 38
Sec. 148.4	12
Sec. 149.3	12
Sec. 149.9	37
Sec. 150.3	12
Executive Order No. 9070, 7 F.R. 1529	6
Federal Rules of Civil Procedure:	
Rule 4(f)	43
Rule 12(b)	44
Rule 25(a)	2
Rule 25(d)	2

Miscellaneous:

	Page
3 Fletcher, *Cyclopedia of the Law of Private Corporations* (Perm. Ed.) Sec. 1000	33
Hornstein, *The Counsel Fee in Stockholder's Derivative Suits*, 39 Col. L.R. 784, 816	34
Hornstein, *Directors' Expenses in Stockholders' Suits*, 43 Col. L.R. 301	34
H. Rep. No. 1418, 72d Cong., 1st sess., pp. 3, 6, 10	7
97 L. Ed. Adv. No. 2, p. 117	2
2 Moore's *Federal Practice* (2d ed.), pp. 2260-2264	44
Note 152 A.L.R. 924-926	34
Report of the Comptroller General on the Audit of the Home Loan Bank Board for the Year Ended June 30, 1952, H. Doc. No. 52, 83d Cong., 1st sess.:	
pp. 1, 3-4	6
pp. 10-11	6, 27
United States Government Organization Manual 1952-53:	
pp. 419-421	6
p. 621	6, 7

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 591

MALLONEE, BUCKLIN, AND FERGUS, SHAREHOLDERS PROTECTIVE COMMITTEE, AND LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, PETITIONERS

v.

FAHEY, AMMANN AS CONSERVATOR, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS FAHEY, AMMANN, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, DIVERS, ADAMS, LA ROQUE, HEISLER, AND BRAMLEY IN OPPOSITION [1]

OPINIONS BELOW

a. *Home Loan Bank Board* v. *Mallonee (The*

[1] The parties represented by the Solicitor General pursuant to R. S. 361 (5 U.S.C. 306) are:

1. A. V. Ammann and George K. Bramley, formerly Conservator and Assistant Conservator, respectively, of Long Beach Federal Savings and Loan Association.
2. William K. Divers, J. Alston Adams, and Kenneth G.

Conclusion.

There are conflicts between the opinions of the Court of Appeals and the Supreme Court decision. (*Fahey v. Mallonee, supra.*) This case involves the legal right of 16,000 shareholder depositors, of a Federal Savings and Loan Association, to enforce a final judgment for accounting for their seized savings in excess of $26,000,000.00 from a conservator appointed by the Home Loan Bank Board and removed by the District Court.

Respectfully submitted,

EMMETT E. DOHERTY,

Attorney for John D. Willhoit.

Long Beach Action)[2]—The oral opinion of the United States District Court for the Southern District of California (12511 R. 11146-11165) is not reported. The opinion of the United States Court of Appeals for the Ninth Circuit (12511 R. 11503-11640) is reported at 196 F. 2d 336.

b. *Fahey* v. *O'Melveny & Myers (The Los Angeles Action)*[3]—The oral opinion of the United States District Court for the Southern District of California (12591 R. 833-847) is not reported. The opinion of the United States Court of Appeals

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Heisler, members of the Home Loan Bank Board, and O. K. LaRoque, former member of the Home Loan Bank Board. The Home Loan Bank Board also has been made a party although it is not a corporate entity authorized by Congress to be sued. Federal Home Loan Bank Act, Sec. 17, as amended by Reorganization Plan No. 3 of 1947, Statutory Appendix, hereafter referred to as Stat. App., pp. 26-28. Cf. *Blackmar* v. *Guerre*, 342 U. S. 512, 515.

3. Federal Savings and Loan Insurance Corporation.

Federal Home Loan Bank of San Francisco, although a federal instrumentality, is represented by private counsel.

John H. Fahey was Home Loan Bank Commissioner and subsequently a member of the Home Loan Bank Board until his resignation on December 20, 1947. Mr. Fahey died on November 19, 1950. His successors in office and the Home Loan Bank Board have been substituted for him under Rule 25(d), Federal Rules of Civil Procedure. On November 20, 1952, Mr. Justice Douglas, in chambers, denied an application by petitioners to vacate the Court of Appeals' stay of the proceedings in the district court, so that petitioners might apply to the district court to substitute the members of the Home Loan Bank Board for Mr. Fahey in his personal capacity. 97 L. Ed. Adv. No. 2, p. 117 . No attempt, however, has been made to substitute his personal representatives. Accordingly, the action has abated as against Mr. Fahey in his personal capacity (Rule 25(a), Federal Rules of Civil Procedure).

[2] The record in this action will be referred to as "12511 R. ."

[3] The record in this action will be referred to as "12591 R. ."

for the Ninth Circuit (12591 R. 878-1032) is reported at 200 F. 2d 420.

c. Earlier stages of this litigation which have been before this Court include *Fahey* v. *Mallonee,* 332 U. S. 245, and *Ex Parte Fahey,* 332 U. S. 258.

JURISDICTION

a. *Home Loan Bank Board* v. *Mallonee*—The judgment of the Court of Appeals was entered on April 2, 1952 (12511 R. 11641-11642). Petitions for rehearing filed on May 1, 1952, were denied on November 13, 1952 (12511 R. 11684). The petition for a writ of certiorari was filed on February 9, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1253 and 1254(1).

b. *Fahey* v. *O'Melveny and Myers*—The judgment of the Court of Appeals was entered on November 6, 1952 (12591 R. 1033). Petitions for rehearing filed on December 6, 1952, were denied on December 17, 1952 (12591 R. 1036). The petition for a writ of certiorari was filed on February 9, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1253 and 1254(1).

QUESTIONS PRESENTED

1. Whether, where the Home Loan Bank Board located in Washington ordered a Federal Savings and Loan Association located in California to appear at a hearing to be held in Washington, a federal district court in California, lacking personal jurisdiction over the members of the Home Loan Bank Board, could enjoin the holding of the hearing on the grounds that it affected the subject

matter of a case pending before it, and that the court could exercise, if required, the supervisory powers of the Home Loan Bank Board over Federal Savings and Loan Associations.

2. Whether a person claiming to be aggrieved by administrative action may, instead of pursuing his administrative remedy, file an action *in rem* or *quasi-in rem* based on the theory that the governmental action was void *ab initio,* and in that proceeding test the validity of the administrative action.

3. Whether an action for damages lies against officials and government corporations exercising governmental functions, for the alleged improper performance of official acts.

4. Whether a district court may hold null and void the appointment of a conservator for a Federal Savings and Loan Association by the Home Loan Bank Board, where it is admitted (a) that four directors of the Association converted shareholdings in excess of $20,000 into approximately 21,000 separate share accounts of $1 entitled to one vote each, in order to create a voting bloc of about 10 per cent of the outstanding votes, in violation of the charter provision that no member may have more than fifty votes, and (b) that the Association's management created a fund amounting at least to $100,000, in order to fight expected supervisory action against the Association's management.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations will be found in the separate Statutory Appendix (Stat. App.).

STATEMENT

The two decisions of the Court of Appeals, review of which is sought by petitioners in the instant case, as well as by petitioners in Nos. 592-596 and 658, dispose in effect of a body of litigation, designed to nullify two steps taken in 1946 by the Federal Home Loan Bank Commissioner in connection with his statutory function of supervising the Federal Home Loan Bank system. The first step, discussed mainly in the *Los Angeles* case (No. 592), was the readjustment of the Federal Home Loan Bank districts of Los Angeles and Portland and their merger into a new San Francisco district. The other step, which is the basis of the *Long Beach* case (No. 591), was the appointment of a conservator for the Long Beach Federal Building and Loan Association (hereafter referred to as "Long Beach").

These two administrative actions were essentially independent from one another. Throughout the proceedings, however, petitioners in this case and in Nos. 592-596, 658, have attempted to intertwine these separate basic events through the use of procedural devices such as cross-claims, interpleaders, interventions, third-party actions, and the like. Although the instant petition arises out of an appeal from a temporary injunction prohibiting the holding of an administrative hearing with respect to Long Beach, the opinion of the Court of Appeals,

reversing the order, was based in part on the ground that all the *Long Beach* proceedings should be dismissed (see, *e.g.*, 12511 R. 11582); conversely, some of the ramifications of the *Long Beach* litigation have had their effects upon the *Los Angeles* case. It appears appropriate, therefore, to set forth a fairly detailed account of the facts underlying all seven petitions, as well as of the structure of the Federal Home Loan Bank system.

1. The federal home loan bank system [4]

The Federal Home Loan Bank system, consisting of the Home Loan Bank Board, the Federal Home Loan Banks, the Federal Savings and Loan Associations, and the Federal Savings and Loan Insurance Corporation, was created during the depression years by the Federal Home Loan Bank Act of 1932,[5] the Home Owners Loan Act of 1933,[6] and the National Housing Act of 1934, Title IV.[7]

The *Home Loan Bank Board* [8] heads the system.

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[4] The report of the Comptroller General on the *Audit of the Home Loan Bank Board* for the Year ended June 30, 1952, H. Doc. No. 52, 83d Cong., 1st Sess., pp. 1, 3-4, describes the operation of the Federal Home Loan Bank system. Cf. pp. 10-11 of this report, referring to the instant litigation. See also United States Government Organization Manual 1952-53, pp. 419-421, 621.

[5] 47 Stat. 725. The pertinent sections of this Act are set forth in Stat. App., pp. 7-18.

[6] 48 Stat. 128. The pertinent sections of this Act are set forth in Stat. App., pp. 18-24.

[7] 48 Stat. 1255-1261. The pertinent provisions of this Act are set forth in Stat. App., pp. 24-26.

[8] Federal Home Loan Bank Act, Sec. 17, Stat. App., pp. 16-17. The Federal Home Loan Bank Act originally created the Federal Home Loan Bank Board consisting of five members. By Executive Order No. 9070, 7 F.R. 1529, the functions

The functions of this Board, pertinent to the present inquiry, are the supervision of the Federal Home Loan Banks,[9] of the Federal Savings and Loan Associations[10] and of the Federal Savings and Loan Insurance Corporation.[11]

Federal Home Loan Banks, established pursuant to the Federal Home Loan Act, are intended to serve as a reserve system for home financing institutions.[12] Under Section 3 of the Act,[13] the Home Loan Bank Board is required to divide the United States into not less than eight and not more than twelve districts and to establish as soon as practicable a Federal Home Loan Bank in each district. Under this section, the Board also has the express power to readjust those districts. Savings and home financing institutions are privileged to subscribe to the capital stock of the Federal Home Loan Banks;[14] but if such subscriptions do

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of the Board were transferred to the Federal Home Loan Bank Commissioner, effective February 24, 1942. John H. Fahey served in that capacity in the Spring of 1946. 12511 R. 11611-11614. Reorganization Plan No. 3 of 1947, Stat. App., pp. 26-28, established the present Home Loan Bank Board consisting of three members. See also U. S. Government Organization Manual, 1952-1953, p. 621.

[9] Federal Home Loan Bank Act, Sec. 17, Stat. App., pp. 16-17; cf. *Fahey* v. *Mallonee*, 332 U.S. 245.

[10] National Housing Act, Sec. 402. Stat. App., pp. 24-25. p. 20; *Fahey* v. *Mallonee*, 332 U.S. 245.

[11] National Housing Act, Sec. 402. Stat. App., pp. 24-25.

[12] H. Rep. No. 1418, 72d Cong., 1st Sess., pp. 3, 10. The report points out (p. 6) that the Federal Home Loan Act has been fashioned largely on the European central mortgage banking systems which are subject to vigorous government supervision.

[13] Stat. App., p. 7.

[14] Federal Home Loan Bank Act, Secs. 4(a), 6(c).

not amount to the required minimum capital, as determined by the Board, the United States must subscribe for the difference.[15] Federal Home Loan Banks, and the securities issued by them, enjoy extensive tax exemptions;[16] they also may be designated as depositories of public moneys and as fiscal agents of the United States.[17]

Four of the twelve directors of each of the Federal Home Loan Banks are appointed by the Home Loan Bank Board; the remaining eight are nominated and elected pursuant to rules and regulations prescribed by the Board. The Board also determines which of the directors shall be the Chairman and the Vice Chairman,[18] and has the power to suspend or remove any director, officer, employee, or agent of a Federal Home Loan Bank.[19] The corporate powers of the Federal Home Loan Banks are to be exercised subject to the approval of the Board.[20] They have corporate succession until dissolved by Congress or the Board,[21] which has power to liquidate or reorganize a Federal Home Loan Bank when it finds "that the efficient and economical accomplishment of the purposes of this Act will be aided by such action";[22] and, as has been indicated above, the Board has express power to readjust Federal Home Loan Bank districts.

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[15] Federal Home Loan Bank Act, Sec. 6(a), (f). Stat. App., pp. 8-9.
[16] Federal Home Loan Bank Act, Sec. 13. Stat. App., pp. 14-15.
[17] Federal Home Loan Bank Act, Sec. 14. Stat. App., p. 15.
[18] Federal Home Loan Bank Act, Sec. 7, Stat. App., p. 10.
[19] Federal Home Loan Bank Act, Sec. 17. Stat. App., p. 16.
[20] Federal Home Loan Bank Act, Sec. 12. Stat. App., p. 13.
[21] Federal Home Loan Bank Act, Sec. 25. Stat. App., p. 17.
[22] Federal Home Loan Bank Act, Sec. 26. Stat. App., p. 17.

Federal Savings and Loan Associations were established by the Home Owners' Loan Act of 1933 "in order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes." [23] The Home Loan Bank Board is authorized to provide for the organization, incorporation, examination, and regulation of associations to be known as "'Federal Savings and Loan Associations' * * * giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." [24] Federal Savings and Loan Associations automatically become members of the Federal Home Loan Bank in the district of which they are located, or, in some circumstances, of an adjoining one.[25] The Act provides for public financial support of Federal Savings and Loan Associations by way of stock subscriptions on the part of the Secretary of the Treasury and the Home Owners' Loan Corporation,[26] and for extensive tax exemptions.[27] Section 5(d) (Stat. App., p. 20) grants the Board full power to provide rules and regulations governing the reorganization, consolidation, merger, or liquidation of Federal Savings and Loan Associations, including the power to appoint a conservator.[28]

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[23] Home Owners' Loan Act of 1933, Sec. 5(a). Stat. App. pp. 18-24.

[24] *Ibid.*

[25] Home Owners' Loan Act of 1933, Section 5(f). Stat. App. p. 21.

[26] Section 5(g). Stat. App., p. 21.

[27] Section 5(h). Stat. App., p. 22.

[28] Cf. *Fahey* v. *Mallonee*, 332 U.S. 245.

The *Federal Savings and Loan Insurance Corporation,* created pursuant to Title IV of the National Housing Act of 1934, is under the direction of a board of trustees composed of the members of the Home Loan Bank Board.[29] The Corporation insures the accounts of all Federal Savings and Loan Associations and may insure the accounts of other similar institutions.[30] The insurance becomes payable upon default of the insured institution and is payable either in cash or by the opening of a new insured account with another insured institution.[31]

2. THE ADMINISTRATIVE ACTIONS UNDERLYING THE LITIGATION

a. *The readjustment of the Federal Home Loan Bank districts on the Pacific coast.* On March 29, 1946, the Federal Home Loan Bank Commissioner,[32] acting pursuant to Secs. 3, 25, and 26 of the Home Loan Bank Act,[33] and finding that the proposed action would "aid the efficient and economic accomplishment of the * * * Act," issued three orders (Nos. 5082, 5083, and 5084, 12511 R.

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[29] National Housing Act of 1934, Sec. 402(a), Stat. App., p. 24 and Reorganization Plan No. 3 of 1947, Sec. 2(c), Stat. App., pp. 27-28.

[30] National Housing Act of 1934, Sec. 403(a).

[31] National Housing Act of 1934, Sec. 405(b) as amended, Stat. App., pp. 25-26. Prior to 1950, immediate cash payment was limited to 10%. Payment of the balance was spread out over a three-year period.

[32] The Commissioner was the predecessor in office of the present Home Loan Bank Board (12511 R. 11611-11612). See fn. 8, *supra*, pp. 6-7.

[33] Stat. App., pp. 7, 7-18.

11614-11617) which readjusted the territory of the Eleventh Federal Home Loan Bank District (Portland) [34] so as to include the Twelfth District (Los Angeles),[35] moved the Federal Home Loan Bank of Portland to San Francisco and renamed it the Federal Home Loan Bank of San Francisco. The orders also provided for the transfer of the assets, liabilities and members of Los Angeles to San Francisco and for the dissolution of Los Angeles.

b. *The appointment of a conservator for Long Beach Federal Building and Loan Association.* An examination of the Long Beach Federal Building and Loan Association (a member of the then Los Angeles Federal Home Loan Bank), conducted in July 1945, disclosed a suspicious transaction between Long Beach's president and one of its customers (12591 R. 113-114). Supplementary examinations of Long Beach conducted in April and May 1946, disclosed additional circumstances indicating that some members of the management of Long Beach were making secret profits in their dealings with certain customers of Long Beach (12591 R. 66-112, 122-128) and other even more alarming facts.[36] As a result, Federal Home Loan

[34] The Eleventh District covered the northern part of the Pacific and mountain states.

[35] The Twelfth District covered the southern part of the Pacific and mountain states and the Territory of Hawaii.

[36] These facts included among others the conversion by four of the directors of their shareholdings, totalling $21,000, into 21,000 separate share accounts for the purpose of obtaining greater voting power, in spite of the charter provisions that no member may hold more than fifty votes (cf. Sec. 4 of the Charter of Federal Savings & Loan Associations, 24 C.F.R. (1952 Pocket Supp.) § 144.1(4)); the appropriation of $100,-

Bank Commissioner Fahey issued Order No. 5254, in which he appointed A. V. Ammann as conservator for Long Beach (12511 R. 11610).[37] The order contained a number of findings, including determinations to the effect that Long Beach conducted its business in an unlawful and unauthorized manner and that it had a management which was unsafe and unfit to manage a Federal Savings and Loan Association (12511 R. 11610-11611).

Pursuant to a demand made on May 24, 1946 (12511 R. 11622-11624), the management of Long Beach was furnished on May 29, 1946, with a "More Definite Statement" of the reasons which led to the appointment of the conservator (12511 R. 11624-11629).[38] The following day, the Long Beach management requested an administrative hearing on the appointment of the conservator (12511 R. 11618-11620). The Federal Home Loan Bank Ad-

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000 for the purpose of conducting expected litigation against the Federal Home Loan Bank Administration, removal of a cashier's check for $50,000 from the Association without making a record thereof, unauthorized payments to the president of the Association, an attempt to cover up for them by retroactively increasing his salary, and either the predating of this transaction in the books of the Association, or the failure to include it for several months in the reports to Federal Home Loan Bank Administration. Cf. *Fahey* v. *Mallonee*, 332 U.S. 245, 254.

[37] The appointment of a conservator terminates the power of the management to represent the Association and transfers this authority to the conservator. In contrast to the appointment of a receiver, it does not affect the title of the Association to its assets. See 24 C.F.R. (Pocket Supp. 1952) 148.4, 149.3, 150.3. The corresponding Rules in effect in the Spring of 1946 were 24 C.F.R. (Cum. Supp. 1944) 206.4, 207.3, 208.3

[38] This statement embodied in effect the findings made in the audit which had led to the appointment of the conservator. See *supra*, fn. 36, pp. 11-12; cf. *Fahey* v. *Mallonee*, 332 U.S. 245, 254.

ministration granted this request on June 5, 1946, and directed that a hearing be held on July 3, 1946, in Los Angeles (12511 R. 11629-11631).

The appointment of the conservator was followed by a serious run on Long Beach. The conservator was required to borrow some $7,300,000—subsequently reduced to $6,300,000—from the Federal Home Loan Bank of San Francisco and to pledge as security for this loan $5,300,000 face value of government bonds and some 8,000 notes and trust deeds held by Long Beach, with a face value of some $12,000,000 (12591 R. 889).[38a]

3. THE PROCEEDINGS IN THE LONG BEACH LITIGATION

a. *The original complaints.* On May 27, 1946, petitioners Mallonee, Newhouse, and Bucklin, shareholders of Long Beach, filed an action in the United States District Court for the Southern District of California, on behalf of all the shareholders of Long Beach, against Commissioner Fahey, Conservator Ammann, Long Beach, and a large number of fictitious defendants, in which they challenged the validity of the appointment of the conservator, and asked for an order removing him, restoring Long Beach to its former management, requiring

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[38a] Petitioners have tried to use this loan as a legal link between the *Long Beach* and *Los Angeles* actions. See *infra*, pp. 14, 23-25. The claims are, on the one hand, that the conservator lacked the authority to create this indebtedness of Long Beach, in spite of the fact that Long Beach obtained the benefit of the loan. On the other hand, it is alleged that the money advanced by the Bank was actually the money of Los Angeles, and that Long Beach does not know whether it owes the debt to San Francisco or Los Angeles.

Fahey and the conservator to account, and adjudicating the rights of the parties (12511 R. 1-25).[39] On July 1, 1946, Long Beach, the nominal defendant, filed a pleading containing a cross-claim against Fahey and Ammann substantially identical to the original complaint filed by Mallonee, Newhouse and Bucklin (12511 R. 302, 323-358), and a third-party complaint against the Federal Home Loan Banks of San Francisco, Los Angeles, and Portland, on the grounds that the appointment of Ammann being illegal and void, the pledge of Long Beach's assets to San Francisco was void, and that, in addition, the dissolution of Los Angeles was void and accordingly Long Beach did not know which of the three Federal Home Loan Banks was the proper defendant (12511 R. 286-301). On August 22, 1946, Los Angeles, as third-party defendant, filed a similar cross-complaint, challenging the validity of its own dissolution (12511 R. 564-586).[39a]

b. *Various interpleaders.*

(i) Title Service Company. An answer and cross-complaint in interpleader was filed on June 4, 1946, by Title Service Company, a corporation without issued capital stock, the management of which was virtually identical to that of Long Beach

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[39] This was the beginning of the so-called *Long Beach* litigation.

[39a] On the same day, Los Angeles and six of its former member associations filed an independent, but virtually identical, complaint, challenging the dissolution of Los Angeles (12511 R. 9465-9497). This was the so-called *Los Angeles* action.

(12511 R. 11081, 11087, 11517, 11519). Title Service deposited 174 trust deeds in court, alleging that it was named trustee in trust deeds securing loans granted by Long Beach and that it was faced with conflicting directions from the conservator, who requested reconveyance of the deeds to the borrowers who had made their final payments to him, and from the officers of Long Beach (*i.e.*, the interpleading parties themselves) who contested the conservator's authority. The interpleader asked that the court adjudicate the right of the conflicting claimants (12511 R. 45-55). These pleadings did not dispute the fact that the deeds should be reconveyed to borrowers who had made their final payments. As additional requests for reconveyances were made, Title Service filed four supplemental interpleaders (12511 R. 766, 995, 2305, 2581). Borrowers desiring to obtain discharge of their mortgages were required to intervene in the *Mallonee* action (*i.e.*, the *Long Beach* suit) and to deposit their final payment in court.[40] This procedure added at least fifty interventions to the *Mallonee* action.[41]

(ii) Wallis interpleader. On June 12, 1946 (12511 R. 86-100), an interpleader was filed by Robert H. Wallis, the payee of the $50,000 check referred to *supra,* fn. 36, pp. 11-12. Wallis alleged that he acted as an attorney for Long Beach, that

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[40] As the result of the order requiring the payment of these moneys into court, more than $1,500,000 of the Long Beach's funds were tied up, over the protest of the conservator (12511 R. 10204).

[41] 12511 R. 11560, 8287, 8291-8293.

he was given the check for the purpose of defending Long Beach against the expected attacks made upon it by Fahey and that the Long Beach management still insisted that the money be used for such purpose, while the conservator claimed that the fund could not be so used. He therefore asked the court to instruct him as to his duties in respect to this $50,000 check.

(iii) Turner interpleader. Turner is the lessee of a building which he rented from Long Beach. The claim that the rent charged to Turner was inadequate was one of the charges which led to the appointment of the conservator (12511 R. 11627). On January 29, 1948 (12511 R. 3461-3487), over a year and one-half after the filing of the original complaints, and five days after the termination of the conservatorship of Long Beach (see *infra,* p. 21), Turner filed his interpleader, paying into court the rent which had accrued during the conservatorship ($11,515.87). He alleged that he had withheld the rent while there were conflicting claims between the conservator and the management of Long Beach and that the termination of the conservatorship did not put an end to the conflicting claims since two shareholders of Long Beach had filed derivative stockholder actions, in a state court, charging that the lease was collusive. The nexus between that stockholder action and the instant litigation was attempted to be supplied by an allegation to the effect that the stockholders' action had been filed in collusion with Ammann (12511 R. 3477).

(iv) The interpleading of the Federal Savings and Loan Insurance Corporation. The Second Supplemental Cross-Claim filed by Long Beach on May 11, 1949 (12511 R. 6736-6790) contains an interpleader of the Federal Savings and Loan Insurance Corporation. In accord with this pleading, Long Beach paid into the district court premiums owed to the Corporation on the grounds that its stockholders challenged the amount of the premiums due and that by paying the full amount the management might render itself liable to the stockholders or estop itself from challenging some of the conservator's actions, while nonpayment of such premiums might result in penalties and forfeitures (see also 12511 R. 6920-6933).

e. *Service on non-resident defendants.* A number of the defendants—in particular, Fahey, the members of the Home Loan Bank Board, and the Federal Savings and Loan Insurance Corporation —were not residents of California. Service was made upon them pursuant to 28 U.S.C. 1655 and 2361 (Stat. App., pp. 3 and 5) on the theory that the actions were *in rem* and that the interpleaders came within the terms of the Federal Interpleader Statute (28 U.S.C. 1335), Stat. App., p. 1. Cf. 12511 R. 65-68, 9502-9510; 78-82.

d. *The first injunction proceedings.*[42] As has been pointed out (*supra,* pp. 12-13), the Federal Home Loan Bank Administration, in compliance with a request made by the management of Long

[42] These proceedings were before this Court in *Fahey* v. *Mallonee,* 332 U.S. 245.

Beach, had set a hearing on the appointment of the Long Beach conservator for July 3, 1946. The holding of this hearing was enjoined on July 1, 1946, by a temporary restraining order obtained by the plaintiff shareholders in the *Mallonee* action [43] on the ground that Section 5(d) of the Home Owners' Loan Act,[44] providing for the appointment of a conservator, and the regulations issued thereunder, were unconstitutional (12511 R. 362-367, 372-374).[45] This injunction was made permanent by a three-judge district court which, prior to the filing of an answer, held Section 5(d) unconstitutional, removed the conservator, and enjoined the holding of the administrative hearing (12511 F. 743-757).[46]

This Court reversed the decision of the district court. It held that the court had erred in finding Section 5(d) unconstitutional, in ousting the conservator, and in enjoining any of his proceedings or the administrative hearing, "and this without prejudice to any other administrative or judicial proceedings which may be warranted by law." *Fahey* v. *Mallonee,* 332 U.S. 245, 257-258.

e. *Proceedings immediately subsequent to the decision in Fahey* v. *Mallonee, 332 U.S. 245.* As the result of the decision of this Court, the district court, on November 10, 1947, vacated the order en-

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[43] 12511 R. 11543.

[44] Stat. App., p. 20.

[45] Subsequently, the management of Long Beach joined the proceedings to enjoin the holding of the hearings they themselves had requested. Cf. Brief filed by Long Beach in No. 687, O.T. 1946.

[46] The execution of this order was stayed by Mr. Justice Rutledge (12511 R. 762-763).

joining the holding of the administrative hearing (12511 R. 10302). It refused, however, to dismiss the interpleaders or to release the funds paid into court under them (12511 R. 10302), although, as counsel for the conservator pointed out, this, in effect, continued the original injunction reversed by this Court (12511 R. 10203, 10218).

With respect to the original complaints, the District Judge (who had been a member of the original three judge court) advised Mallonee and Long Beach that under this Court's decision their complaints would have to be dismissed for failure to exhaust their administrative remedy, *viz.*, the hearing before the Federal Home Loan Bank Administration on the appointment of the conservator. The District Judge volunteered, however, that he would maintain the complaints if they were then amended to contain the further charge that the administrative officials had acted fraudulently, and he gave plaintiffs leave to amend accordingly.[47]

Amended pleadings filed by Mallonee *et al.* on December 9, 1947 (12511 R. 2960-3098) and by Long Beach on January 13, 1948 (12511 R. 3184-3366), contained the allegations, suggested by the District Judge, that the actions of the defendant officials were fraudulent. The specifications of fraud were that the findings supporting the order appointing the conservator and the "More Definite Statement" of the reasons leading to the appointment were false and known to be false to the

[47] See the opinion of the court below, 196 F. 2d 336, 370-373; 12511 R. 11562-11568, 11631-11633, 10298-10302.

defendant officials (12511 R. 2977, 2983, 3216). Long Beach's pleading, however, admitted the charges that Long Beach had appropriated $100,000, had paid out a cashier's check amounting to $50,000, and that four directors had converted their holdings into approximately 21,000 $1.00 share accounts with one vote each as described at fn. 36, pp. 11-12. It was pleaded in confession and avoidance that these steps were necessary to counteract the "malicious" measures the supervising authorities were expected to take and that these 21,000 votes represented merely ten per cent of the total votes available (12511 R. 3237, 3239-3240, 3241-3242).

After this Court's reversal of the injunction prohibiting the holding of the administrative hearing on the appointment of the conservator, the Home Loan Bank Board rescheduled it for December 15, 1947. As the Court of Appeals found, this hearing was indefinitely postponed at the request of both Long Beach and Mallonee *et al.* (12511 R. 11637).[48]

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[48] The petitions (cf. No. 591, p. 21) assert repeatedly that administrative hearings were denied by the Home Loan Bank Board and they refer to extracts from an exchange of correspondence between the Board and attorneys for minority stockholders. Petitioners' Combined Appendix, 19-21. Full reproduction of the documents would have disclosed that the demand for the hearing came from a group of shareholders, seeking *reinstatement* of the conservatorship, who had filed a stockholders action against the management of Long Beach (*supra*, p. 16). The hearing was denied on the ground that such demand must be initiated by the Board of Directors (24 C.F.R. (Pocket Supp. 1952) 148.2). Petitioners can derive no support from the denial of a hearing to a group hostile to them, especially when the hearings had been adjourned at their own request. Indeed, the grant of this hearing to the minority stockholders might well have been a breach of faith with petitioners themselves.

f. *Termination of the conservatorship.* The above-described proceedings—interpleaders, interventions, payments into court—virtually strangled the conservatorship. As pointed out by the court below, Long Beach was in effect run not by the conservator but by the district court (12511 R. 11561). The continuation of the Title Service interpleader, which required payment into court of the final payments made by mortgagors, depleted the working capital of Long Beach (cf. 12511 R. 10203-10204); so did the district court's refusal to release the impounded funds to the conservator (12511 R. 10302).

At this juncture, the Board decided to terminate the conservatorship (12511 R. 11637-38). Its Order No. 388, dated January 17, 1948, provided for the termination of the conservatorship upon request of the authorized representative of Long Beach and that the assets of Long Beach be turned over to such authorized representative. A subsequent telegram of the Board interpreted this formula to mean that the assets were to be turned over, not to the old management, but to a representative to be selected by the shareholders after a new vote (12511 R. 10312). The district court, however, disregarded this interpretation and by an order dated January 23, 1948, ordered the conservator to return Long Beach to its old management and to account to the court (12511 R. 8310-8327). Although jurisdiction of the district court was still contested, the conservator filed his account

on September 27, 1948 (12511 R. 8235-8239).[49] Since the termination of the conservatorship mooted a number of appeals previously taken by the conservator from certain orders made in borrower-intervention proceedings and from an order allowing an attorneys fee, the appeals were voluntarily dismissed. Cf. 12511 R. 3549-3552.

On May 28, 1948, after the termination of the conservatorship, Long Beach filed a supplemental cross-claim to its amended cross-claim (12511 R. 4161-4332). This pleading proceeded on the theory that since the appointment of the conservator was null and void his dealings with Long Beach's property constituted a conversion for which the defendants were liable in damages.

g. *The San Francisco impound.* By order dated March 13, 1948, the district court directed the San Francisco Home Loan Bank (see *supra*, pp. 10-11, 13) to deposit in court the notes of Long Beach, executed by the conservator, evidencing the Long Beach indebtedness of $6,300,000 to the San Francisco Bank, and all the collateral pledged to secure this debt, i.e., $5,300,000, in government securities and the notes and trust deeds (12511 R. 8399-8524; 12591 R. 889). On March 26, 1948, the district court released the notes and trust deeds to Long Beach free and clear of San Francisco's lien and

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[49] The account and inventory consist of some 800 pages comprising some 150,000 separate items, and have been attacked by petitioners, basically on the ground that since under their theory the conservator's appointment was void, he could not legally dispose of Long Beach's property or enter into any valid contract on its behalf.

transferred this lien to some of the cash deposited in court (12511 R. 8526-8536; 12591 R. 889).[50]

h. *Summary of the complaints as they now stand.* Both the shareholders' complaint in the *Mallonee* action and cross-claim of the Long Beach Association proceeded on the avowed theory that, as the conservator's appointment was illegal, each and every transaction of Long Beach during the conservatorship was "void, ab initio," and subject to challenge, pending the outcome of the litigation testing the validity of the appointment (12511 R. 3079, 3321).[51] It was alleged that, on the appointment of the conservator, withdrawals in excess of $6,000,000 of savings (share accounts) occurred (12511 R. 311, 3220, 3246), and that Long Beach, during the conservatorship, borrowed a like amount from San Francisco, pledging as security therefor

[50] In March, 1952, by special leave of the Court of Appeals, San Francisco filed an action against Long Beach in which it sought payment of the notes and enforcement of the liens. The filing of this complaint gave rise to a new avalanche of counterclaims, third-party complaints, cross-claims, interpleaders, and interventions, weighing nearly 12 pounds. The district court is actively entertaining those pleadings, which are substantially identical to those of the present litigation, in spite of the fact that the Court of Appeals has indicated that the instant complaints should have been dismissed and has stayed all further proceedings in the district court (12511 R. 11685).

We have been authorized by the Federal Home Loan Bank of San Francisco to repeat its statement before the Court of Appeals that it does not seek the return of the notes and trust deeds returned to Long Beach pursuant to the order of March 26, 1948, nor to exercise its lien on those notes and trust deeds. See also par. 7 of the mandate proposed to the court below (12511 R. 11642, 11644).

[51] As noted above (*supra*, pp. 19-20), the complaints were amended, after this Court's decision in *Fahey* v. *Mallonee*, 332 U.S. 245, to allege fraud and bad faith in the appointment of the conservator.

approximately $12,000,000 of Long Beach's notes and trust deeds on homes of 8,000 borrowers (12511 R. 3224, 667-668, 3584-3586), thereby clouding the titles thereto; used Long Beach's funds to pay principal and interest to the Bank and to purchase shares therein (12511 R. 4219, 4222, 4227, 4229); sold millions of dollars of Long Beach's United States Government bonds (12511 R. 4197, 4199, 4201, 4204); and made $4,000,000 of "improvident" loans (12511 R. 4174). Each of these transactions allegedly gave rise to "controversies" which were "increasing multifold, both in numbers of parties, in the millions of dollars of assets involved, and are snowballing in magnitude, to the point of making extremely difficult, a final settlement * * *" (12511 R. 3310-3311).

The relief originally prayed for included the removal of the conservator; the return of Long Beach's assets to its former management; the filing of a "detailed" statement or "accounting" describing the assets turned over to the conservator on the date of his appointment and each of the conservator's subsequent dealings therein (12511 R. 22-23, 350-351); and a determination whether Los Angeles was lawfully dissolved (12511 R. 300-301). As later amended, the complaint and cross-claims further prayed for a judgment decreeing that all obligations incurred by Long Beach during the conservatorship, particularly the loan from San Francisco, and all transfers of Long Beach's property in pledge or otherwise during the same period, were null and void, and directing that all such property

in the possession or control of the defendants be returned to Long Beach, or that, if any such property could not be so returned, Long Beach be awarded money damages against the defendants personally served within the local district, in the amount of the highest value from the time the property was allegedly converted to the date of the trial (12511 R. 3317). Long Beach's supplemental cross-claim, filed May 27, 1948, prayed for such damages without limitation to the property which could not be so returned or to the defendants thus served (12511 R. 4161, 4167, *et seq.*).

No trial on the merits of these various allegations has yet been had.

i. *The injunction under review in the Court of Appeals.* As pointed out (*supra,* pp. 21-22), Long Beach was returned to its management in January, 1948. The latter, however, omitted to submit to the Home Loan Bank Board the annual and monthly reports prescribed by the regulations 24 C. F. R. (Pocket Supp. 1952) 145.21, 145.22, 145.23) and did not pay the semi-annual premiums to Federal Savings and Loan Insurance Corporation.[52] The Board, therefore, issued its Order No. 2015 (12511 R. 11595-11596), on September 9, 1949, calling for Long Beach to appear in Washington to show cause why the Board should not take such action as might appear appropriate, including the appointment of the Federal Savings and Loan Insurance Corporation as receiver.

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[52] On the Federal Savings and Loan Insurance Corporation interpleader see *supra,* p. 17.

On October 18, 1949, Mallonee *et al.*, Long Beach, Title Service, Wallis, and Turner obtained a temporary restraining order enjoining the holding of the Board hearing (12511 R. 8328-8356). Hearings on an application for preliminary injunction were held on November 8 and 9, 1949 (12511 R. 11162). Detailed findings of fact were then formulated at a hearing from which government counsel were expressly excluded (12511 R. 11174-11176).[53] The formal order dated December 1, 1949, which with its exhibits covers the entire Vol. XVIII of the printed record, enjoined the respondents from holding the administrative hearing and from interfering in any way with the subject matter of the litigation. In issuing the injunction, the district court held that it had jurisdiction over all persons and parties to the consolidated actions and of the subject matter thereof (12511 R. 11146-11153); that the proposed administrative hearing, insofar as it related to the charges made in the "More Definite Statement" of May 29, 1946 (*supra*, p. 12), involved the same matters as those at issue in the pending *Mallonee* action (12511 R. 11157), and insofar as it related to the failure of Long Beach to file monthly and annual reports, was unwarranted because the filing of such reports would require Long Beach to waive its claims for damages and other relief in the pending *Mallonee* action

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[53] The district judge stated (at 12511 R. 11177), "I have invited you gentlemen because I feel that this is to be the Court's order and that I have the right to invite any counsel in the case to assist me and to exclude any other counsel in the preparation of this order * * *."

(12511 R. 11153-11154, 11157-11158); that the holding of the administrative hearing would thus interfere with the court's jurisdiction, as well as with the enforcement of orders theretofore entered by the court in ancillary proceedings (12511 R. 8263, 8271); and that if there were any legitimate grounds for complaint against Long Beach's management, the Board could file its complaint with the court and obtain from it any appropriate relief. (12511 R. 8256, 11162). As the result of this injunction and Long Beach's refusal to submit reports, there has been no administrative supervision of Long Beach for the last five years,[54] since the withdrawal of the conservator in January 1948.

j. *The Court of Appeals' decision.* The Court of Appeals reversed the district court's order of injunction (12511 R. 11503-11640). It based its decision largely on petitioners' failure to exhaust their administrative remedies—the hearing before the Home Loan Bank Board on the appointment of the conservator (*supra*, pp. 12-13)—and pointed out that this administrative remedy, far from being a trivial technicality, would have provided a simple record from which such judicial review as might be warranted could have been had (12611 R. 11557). It also pointed out that the by-passing of the administrative remedy, on the theory that the administrative action was null and void and could be

[54] Report on Audit of the Financial Statement and Accounts of the Home Loan Bank Board and the Organizations under its Supervision for the Term Ended June 30, 1952. H. Doc. No. 52, 83rd Cong., 1st Sess., p. 11.

disregarded in a judicial proceeding, resulted in a record on appeal—without ever reaching the merits of the allegations—of approximately 11,500 pages, necessitating an index of 129 pages, more than fifty interpleaders, and more than 100 hearings, asserted to have led to ten final judgments. Before the court were brought thousands of fictitious defendants and about 100 specific defendants. A notice of *lis pendens* covering several thousand parcels of real estate had been filed. Finally, the district court felt itself forced to run the affairs of Long Beach (12511 R. 11559-11561). The Court of Appeals epitomized its conclusions as follows (12511 R. 11606-11607):

> The presently involved state of the record which resulted from the failure to exhaust the administrative remedy in the initiatory stage of this litigation thereby causing this litigation to fan out and proliferate into its present complications provides no sound reason in law for another judicial repudiation of a procedure clearly authorized under law and the rules and regulations of the Board. The answer to the unhappy and regrettable involvements of this long drawn-out and costly litigation is not to be found in a further resort to a court injunction to completely thwart an administrative process which Congress has seen fit to approve.

ARGUMENT

This case arises out of attempts by the petitioners to nullify the effective supervision of one Federal

Savings and Loan Association by the administrative agency created by Congress for the very purpose of regulating and supervising Federal Savings and Loan Associations. There are no fundamental constitutional problems concerning property rights, seizure, or confiscation involved here. The petitioners[55] are engaged in the operation of a savings institution, which has traditionally been subject to the most stringent regulation and supervision.[56] Moreover, Federal Savings and Loan Associations—above and beyond normal banking institutions—have unquestionably a public character,[57] and their establishment has been made possible only by public subsidies.[58] The supervision of such associations has been entrusted by Congress to an expert administrative body, the present Home Loan Bank Board. By dint of their pleadings and subsidiary proceedings in their main suit, petitioners have succeeded in nullifying the express statutory powers of the Board for seven years. When this Court in effect found their original pleadings insufficient, the expedient of amending those pleadings to include allegations of fraud continued to prevent administrative action which was

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[55] The petitioners in No. 591 are Long Beach Federal Savings and Loan Association and Mallonee, Bucklin, and Fergus, suing on behalf of the association. Their rights, of course, are not any more extensive than those of the association. *Fahey* v. *Mallonee*, 332 U.S. 245, 255.

[56] *Fahey* v. *Mallonee*, 332 U.S. 245, 253-254. Petitioners appear to be the first persons, since the passage of the Home Owners' Loan Act of 1933, to challenge the supervisory powers of the Home Loan Bank Board and its predecessors.

[57] *Fahey* v. *Mallonee*, 332 U.S. 245, 256.

[58] *Supra*, p. 9.

long overdue. Yet the supposed fraud consisted, not in personal corruption or a breach of trust for personal gain, but in the making of the administrative findings in the knowledge that they were false, a contention clearly insufficient to warrant any kind of collateral attack when a proceeding for administrative review of the findings was readily available. The nature of these allegations of "fraud" is indicated by the fact that petitioners admitted the truth of serious charges of breach of trust imposed upon them as officers of banking institutions in their own pleadings (see *supra*, p. 20).[59]

Moreover, although petitioners primarily sought to set aside administrative action which originated in Washington, they have sought to evade the proper venue by drawing up the complaint as an *in rem* action relating to the property of Long Beach. This, in turn, compelled them to adopt the theory that the administrative action sought to be overturned was absolutely void and that the business transactions performed by the conservator during the 20 months of his tenure were equally void. The attempt to try an action seeking judicial review of administrative action as if it were "a conventional cause of action in equity by an owner out of possession, to quiet title, to remove a cloud on title, and to regain possession" [60] resulted, of neces-

[59] Petitioners could not deny the truth of several of the charges (acquisition by the four directors of 21,000 shares, in violation of the charter provisions limiting shareholderships to 50 shares per holder; and placing at the disposal of the directors and their attorney a fund of at least $100,000, *supra*, fn. 36, pp. 11-12; 20), but considered them answered by the mere assertion that they were necessary to forestall adverse action expected to be taken by the supervisory authorities.

[60] Wilmington Petition (No. 592) p. 43.

sity, in unmanageable proceedings. As pleadings and orders grew in length and size, and the number of parties acquired inflationary proportions,[61] the day on which the merits could be tried became more and more remote.[62] The mere mechanical failure of these proceedings discloses the wisdom of the rules which require the exhaustion of administrative remedies, give validity to the acts of a *de facto* officer, and prohibit such collateral attacks on the validity of administrative action as have been attempted here.

While the direct subject matter of this petition is the reversal by the court below of an interlocutory injunction, the scope of review in the Court of Appeals was not limited to the propriety *vel non* of the issuance of the interlocutory injunction. Quite properly, that court not only reversed the injunction but indicated that the complaints and proceedings should be dismissed. Further prosecution of the suit will entail needless expense because of several insuperable objections to the maintenance of the proceedings, and for that reason the court below could order the entire suit dismissed. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 52-53; *North Carolina Railroad* v. *Story*, 268 U.S. 288,

[61] The nearly 200-page long pleading filed by Long Beach on January 13, 1948 (12511 R. 3184-3366) contains the significant admission: "That said controversies have been multiplying and increasing multifold, both in numbers of parties, in the millions of dollars of assets involved, and are snowballing in magnitude, to the point of making extremely difficult, a final settlement and determination, even by this Honorable United States District Court, with its broad equity powers." 12511 R. 3310-3311. In other words, the premature interposition of equity has engendered rather than avoided multiplicity of action. Cf. 12511 R. 11557.

[62] 12511 R. 8257.

292; *Deckert* v. *Independence Corp.*, 311 U.S. 282, 287; *Orth* v. *Transit Inv. Corporation*, 132 F. 2d 938, 944 (C.A. 3).

1. Without regard to any questions of exhaustion of administrative remedies or of procedure, the pleadings must fail on the admitted facts. For the validity of Ammann's appointment as conservator is the focal point of this action,[63] and it appears from the pleadings that this administrative step was completely justified.[64]

The cross-claim of Long Beach admits (12511 R. 3241-3243) the creation of 21,000 one-dollar, one-vote share accounts to be voted by four of the directors, and that these 21,000 shares were created in order to constitute a block of 10 per cent of the votes of Long Beach, to be used in a proxy fight.[65]

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[63] The instant petition, it is true, also raises the issue of the consolidation of the Federal Home Loan Banks of Los Angeles and Portland into the San Francisco Bank. In so far as this case is concerned, that issue has only ancillary impact and we shall discuss it in our brief in opposition in No. 592.

[64] In *Fahey* v. *Mallonee*, 332 U.S. 245, decided on the basis of the original pleadings before an answer was filed (332 U.S. at 248), this Court held that the state of the pleadings did not disclose sufficiently the scope of the controversy and reversed the injunction without prejudice to any other administrative or judicial proceedings which may be warranted by law (332 U.S. at 257-258). This mandate, of course, did not guarantee petitioners a right to a trial on the merits if it appeared that judicial proceedings were not warranted by law.

[65] Congress has recognized that in modern corporate practice, with widely held securities and the failure of many stockholders to vote, a block of 10% or even 5% of the vote may exercise control over a corporation. See, *e.g.*, Public Utility Act of 1935, Sec. 2(a)(7), (8), (11); 49 Stat. 803, 806-807, 808; 15 U.S.C. 79b(a) (7), (8), (11). The Home Loan Bank Administration could easily have reached the same conclusion with respect to Federal Savings and Loan Associations, especially since many shareholders consider themselves depositors rather than voting members.

It is settled doctrine that officers and directors, even of an ordinary private corporation, may not use their positions tc transfer voting control to themselves or to assist other persons to acquire such control.[66] And the offense of the Long Beach management is aggravated by the additional circumstance that the Long Beach charter provides expressly that no member shall have more than fifty votes (see *supra,* fn. 36, p. 11). Moreover, in view of the quasi-public character of mutual savings and saving and loan associations, their officers and directors are subject to standards considerably higher than those of ordinary commercial corporations; their duties have been held identical with those of the trustees of a direct trust. *Greenfield Savings Bank* v. *Abercrombie,* 211 Mass. 252; see also *French* v. *Armstrong,* 79 N.J. Eq. 289; *Huntington* v. *National Savings Bank,* 96 U.S. 388.

Similar considerations apply to the admitted appropriation of $100,000 to subsidize the anticipated fight of the Long Beach management against the supervisory authorities (12511 R. 3237-3239; *supra,* fn. 36, pp. 11-12; 20). Corporate directors or officers may not use corporate funds to defend themselves against charges of misconduct and mismanagement. At best, they are entitled to reimbursement of their expenses if they defend the ac-

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[66] *Andersen* v. *Albert & J. M. Anderson Mfg. Co.,* 325 Mass. 343; *Carlisle* v. *Smith,* 234 Fed. 759 (N.D. Ga.); 3 Fletcher, *Cyclopedia of the Law of Private Corporations* (Perm. Ed.) Sec. 1000.

tion successfully;[67] no recovery is authorized if they are unsuccessful. *Bailey* v. *McLellan,* 159 F. 2d 1014, 1016-1017 (C.A. 1); *Rogers* v. *Hill,* 34 F. Supp. 358, 370 (S.D. N.Y.); cf. Note 152 A.L.R. 924-926. The appropriation of $100,000 to finance the vindication of the management's position was therefore a plain breach of trust, and the same considerations apply to the payment of $50,000 to Wallis, *supra,* pp. 15-16. Certainly, the mere fact that Long Beach's management believed in the correctness of their position and felt themselves persecuted by the Federal Home Loan Administration could not exempt them from their fiduciary duties.

The admitted facts thus presented at least two serious violations of their fiduciary duties by the Long Beach management. The appointment of a conservator pending further investigation of these charges[68] was obviously more than justified in the circumstances—especially considering the delicate nature of the banking business (*Fahey* v. *Mallonee,* 332 U.S. 245, 253). And once it appears that the appointment of the conservator was justified by a lawful purpose, any alleged ulterior motives in the mind of the Administrator are irrelevant. *Isbrandtsen-Moller Co.* v. *United States,* 300 U.S. 139, 145; *United States* v. *Rock Royal Co-Op.,* 307

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[67] Even this reimbursement may require express statutory sanction. Cf. Hornstein, *The Counsel Fee in Stockholder's Derivative Suits,* (1939) 39 Col. L. Rev. 784, 816, with Hornstein, *Directors' Expenses in Stockholder's Suits,* (1943) 43 Col. L. Rev. 301, and N. Y. General Corporation Law, Secs. 63, 67.

[68] And see the bank examiner's reports (12591 R. 66-129).

U.S. 533, 559-560; *United States* v. *Morgan*, 313 U.S. 409, 422. Because the appointment of the conservator was warranted by these admitted facts, the Court of Appeals was clearly correct in directing the dismissal of the entire proceedings, which are predicated wholly on the theory that Ammann's appointment was unwarranted, illegal, and void, and that every act performed by him was void *ab initio*.

2. After the termination of the conservatorship in January 1948, the relief sought by petitioners was restricted to demands for damages and for a judgment decreeing that all obligations incurred by Long Beach during the conservatorship were null and void.[69] Even apart from the justification for the conservator's appointment, these contentions cannot support petitioners' suit.

a. *The demands for damages.* Petitioners seek damages from the conservator, the Home Loan Bank Board and its members, the Federal Savings and Loan Insurance Corporation, and the Federal Home Loan Bank of San Francisco, for the alleged injuries resulting from the appointment of the conservator and his conduct in office. It is, however, settled doctrine that no suit for damages may be maintained against administrative officers of the United States for action taken within the general scope of their authority. *Spalding* v. *Vilas*, 161 U.S. 483, 498; *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S.

[69] This refers in particular to the $7,300,000 loan from San Francisco.

682, 687, fn. 7; *Cooper* v. *O'Connor,* 99 F. 2d 135 (C.A. D.C.); *Adams* v. *Home Owners' Loan Corporation,* 107 F. 2d 139 (C.A. 8); *Jones* v. *Kennedy,* 121 F. 2d 40, 42-43 (C.A. D.C.), certiorari denied, 314 U.S. 665; *Gregoire* v. *Biddle,* 177 F. 2d 579, 580 (C.A. 2), certiorari denied, 339 U.S. 949. And this rule exempting public officials from damage suits applies even when the complaint alleges, as here, that the officials had acted from personal spite, fully aware that they had no right to do the challenged act (*Gregoire* v. *Biddle, supra,* at 580), or that their statements were knowingly false or wrong. *Barsky* v. *United States,* 167 F. 2d 241, 250 (C.A. D.C.), certiorari denied, 334 U.S. 843. The policy behind this rule is the deliberate choice that it is "better to leave unredressed the wrongs done by dishonest officers[70] than to subject those who try to do their duty to the constant dread of retaliation" (Learned Hand, J., in *Gregoire* v. *Biddle, supra,* at 581).[71] The same considerations

[70] The pleadings in the instant cases do not contain any charge that any of the respondents has used his official position for personal monetary gain.

[71] Since this limitation on the right to recover damages from public officials is a matter of substantive law (*Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682, 687 n. 7), the application of this rule to the Federal Home Loan Bank of San Francisco is not foreclosed by the circumstance that San Francisco is a corporation endowed with the power to sue and to be sued. For a Federal Home Loan Bank, like a Federal Land Bank, is an instrumentality of the Federal Government engaged in the performance of an important governmental function, *viz.*, providing reserve facilities for home financing institutions (supra, pp. 7-8). *Federal Land Bank* v. *Priddy,* 295 U.S. 229, 231; *Federal Land Bank* v. *Bismarck Co.,* 314 U.S. 95, 102. To subject it to liability for an alleged tortious execution of its functions would interfere with its functions as a

apply to petitioners' demand for an accounting.[72]

b. *The prayer for a declaratory judgment.* In addition to damages, petitioners sought a decree declaring that all commitments and transfers made by the conservator were without authority and of no legal force and effect.

(i). The acts performed by the conservator bound Long Beach since he was, at the very least, a *de facto* officer. The basic authority of the Federal Home Loan Bank Administration to appoint the conservator, and his official status, were established in *Fahey* v. *Mallonee*, 332 U.S. 245, and *Ex*

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federal instrumentality just as effectively as if it were a natural person. *Federal Land Bank* v. *Priddy, supra*, at 237, and see *Atchley* v. *Tennessee Valley Authority*, 69 F. Supp. 952 (N.D. Ala.).

[72] Cf. *Lucking* v. *Delano*, 122 F. 2d 21, 29 (C.A. D.C.). The regulations of the Home Loan Bank Board provide that the conservator file a report when relieved from his duties and that his accounts will be audited by the Board. 24 C.F.R. (Pocket Supp. 1952) 149.9. These requirements have been complied with. Petitioners' attacks on this account are essentially based on the theory that the conservator had no authority to perform any act on behalf of Long Beach.

The district court directed, in its order of January 23, 1948, *supra*, p. 21, that the conservator file an account. This was done, although at no time was the jurisdiction of the district court to enter such an order conceded. As pointed out above, this account has been attacked on the ground that Ammann had no authority whatever to deal with the property of Long Beach. In so far as the filing of this account could be deemed to have a bearing upon the legal issues before the court below, it is clear that these interlocutory orders can be considered no more than the law of the case, and, as the proceedings were thereafter *in fieri*, all questions were still open, despite any failure to appeal. See *United States* v. *U. S. Smelting Co.*, 339 U.S. 186, 198-199. Further, since the accounting gave rise to the same issues as the undetermined merits of the case, the order directing it could not, in any view, become *res judicata*. *Radio Station WOW Inc.* v. *Johnson*, 326 U.S. 120, 127; *Republic Gas Co.* v. *Oklahoma*, 334 U.S. 62, 68.

Parte Fahey, 332 U.S. 258, 260. Petitioners' allegations of the illegality of the Ammann appointment are not based upon anything appearing on the face of the order establishing the conservatorship, but arise from the secret fraudulent motives supposedly underlying the administrative action (*supra,* pp. 19, 23). Ammann, therefore, clearly had at least the status of a *de facto* officer and his transactions were protected by the familiar rule regularizing transactions with *de facto* officers. The mischief—of which this case may properly be considered the ultimate example—which would result if the countless acts [73] of such an officer could subsequently be challenged for lack of authority requires that such challenges be rejected. *Cocke* v. *Halsey,* 16 Pet. 71, 87-88; *County of Ralls* v. *Douglass,* 105 U.S. 728, 730; *Norton* v. *Shelby County,* 118 U.S. 425, 441; *McDowell* v. *United States,* 159 U.S. 596, 601; *Waite* v. *Santa Cruz,* 184 U. S. 302; *Rockingham County* v. *Luten Bridge Co.,* 35 F. 2d 301 (C.A. 4).[74]

(ii). Another conclusive barrier is the fact that petitioners failed to exhaust their administrative remedy; hence, their recourse to judicial relief was premature. Under the regulations issued by the Home Loan Bank Board and its predecessors (24 C.F.R.) (Pocket Supp. 1952) 148.2 (formerly 24 C.F.R. (Cum. Supp. 1944) 206.2)), the Association had the right to apply for an administrative

[73] Ammann's account contained some 150,000 transactions (*supra,* p. 22, fn. 49).

[74] *Hutchins* v. *Pacific Mutual Life Ins. Co. of California,* 20 F. Supp. 150 (S.D. Cal.), affirmed, 97 F. 2d 58 (C.A. 9), applies the *de facto* officer doctrine to the conservator and liquidator of an insurance company.

hearing within fourteen days after the appointment of the conservator. The Long Beach management availed itself of this opportunity; the Home Loan Bank Administration granted the hearing and gave every interested party opportunity to join the proceedings (12511 R. 11629). Instead, petitioners Mallonee *et al.* obtained an injunction enjoining the administrative hearing and the Long Beach management subsequently joined (*supra*, p. 18, fn. 45) in the successful attempt to enjoin the administrative proceedings it had requested. When the injunction was finally lifted, both petitioners requested an indefinite postponement of the administrative hearing.[75]

Petitioners are not entitled to judicial relief before they have exhausted the prescribed administrative remedy. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 50-51; *Macauley* v. *Waterman SS Corp.*, 327 U.S. 540; *Far East Conference* v. *United States*, 342 U.S. 570.[76] Nor would this administrative hearing have been a mere formality. It must be presumed that petitioners would have been granted a fair hearing which might possibly have disposed of the entire controversy without resort to the courts. *Fahey* v. *Mallonee*, 332 U.S. 245, 256. In any event, the hearing would have permitted a preliminary determination before the expert tribunal

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[75] None of the petitioners in this case or any of the cases before this Court was denied an administrative hearing. *Supra*, p. 20, fn. 48.

[76] It does not matter that this administrative remedy is provided by regulation rather than by statute. *Goldsmith* v. *Board of Tax Appeals*, 270 U.S. 117, 123; *Red River Broadcasting Co.* v. *Federal Communications Commission*, 98 F. 2d 282, 286 (C.A. D.C.), certiorari denied, 305 U.S. 625.

which either would have given petitioners the desired relief or permitted the making of an administrative record on which any judicial review could be based. *Fahey* v. *Mallonee,* 332 U.S. 245, 254, 256; *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U.S. 752, 767; *United States* v. *Jones,* 336 U.S. 641, 673.[77]

(iii). The relief sought by petitioners also constitutes an unwarranted collateral attack on the order appointing the conservator. The theory of petitioners' pleadings is that title to property transferred by the conservator to others actually remained with Long Beach since, in view of the illegality of his appointment, he had no power to convey Long Beach's property and that, consequently, this action "to enforce legal and equitable claims to property" has to pass on the question of the validity of the conservator's appointment.

This, however, cannot be done in the guise of an ordinary property action. Petitioners cannot circumvent the rule requiring the exhaustion of administrative remedies by framing their pleadings so as to make the validity of the administrative action an incidental question subject to judicial reexamination. A person who has failed to avail himself of the appropriate administrative remedies to challenge the validity of administrative action cannot attack the validity of the order in an independent legal proceeding. *Yakus* v. *United States,* 321 U.S. 414, 443-444, and authorities cited there.

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[77] The circumstance that the removal of the conservator has now obviated the administrative hearing does not improve petitioners' position. *Yakus* v. *United States,* 321 U.S. 414, 444-445; *Lichter* v. *United States,* 334 U.S. 742, 791-792.

In another lawsuit, the order must be considered as valid until it is set aside in the appropriate proceedings. The collateral action may not be bottomed on the theory that the order is void. To hold otherwise would be intolerable and destructive to orderly administrative procedure.[78] *Adams* v. *Nagle,* 303 U.S. 532, 540, 543; *Larson* v. *Domestic and Foreign Commerce Corporation,* 337 U. S. 682, 695.

(iv). Whether or not a conservator should be appointed for a Federal Savings and Loan Association raised delicate questions involving specialized knowledge, judgment, and discretion. In the related field of national banks it has been held that the decisions of the Comptroller of the Currency, including the appointment of a receiver, are not subject to judicial review, since such problems have been referred to his, and not the court's, judgment and discretion. *Kennedy* v. *Gibson,* 8 Wall. 498, 504-505; *Casey* v. *Galli,* 94 U. S. 673; *Bushnell* v. *Leland,* 164 U. S. 684, 685; *Adams* v. *Nagle,* 303 U. S. 532, 540; *United States Savings Bank* v. *Morgenthau,* 85 F. 2d 811, 814 (C.A. D.C.), certiorari denied, 299 U. S. 605; and see *United States* v. *Jones,* 336 U. S. 641, 652. This Court has pointed out that the only possible exception to the rule is the case of an actual fraud (*Adams* v. *Nagle,* 303 U. S. 532, 541-542), *i.e.,* personal corruption or

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[78] It is significant that the decisions upholding the action of a *de facto* officer have occasionally used the argument that the validity of the officer's appointment may not be attacked collaterally. *Cocke* v. *Halsey,* 16 Pet. 71, 87; *Waite* v. *Santa Cruz,* 184 U.S. 302, 323.

breach of trust for personal gain,[79] neither of which is involved in the instant case. The synthetic allegations of fraud pleaded in the instant case—the making of findings in the knowledge that they are false—fall short of this test. This rule governing national banks would appear to apply with equal force to Federal Savings and Loan Associations. Accordingly, the pleadings in the instant case fail to establish any basis for judicial review, even if such review were properly available in this action.

3. We have shown (*supra*, pp. 32-42) that the *Mallonee* complaint and the *Long Beach* cross-claim do not state claims giving rise to relief which can be awarded in this suit. These grounds suffice to show that the district court erred in granting the injunction. There are, in addition, other reasons supporting the ruling of the court below.

a. Order No. 2015 (the execution of which was enjoined) provided for a hearing in Washington; it was issued in Washington by the members of the Home Loan Bank Board, none of whom had been served personally in this action. The district court thus plainly lacked jurisdiction to issue the injunction. *Blackmar* v. *Guerre*, 342 U. S. 512.

Nor did the district court acquire jurisdiction over the Board members by virtue of service pursuant to 28 U. S. C. 1655 (Stat. App. p. 3) on the theory that this action sought to enforce a claim to property, etc. Section 1655 provides, by its

[79] See, *e.g.*, *Baker* v. *Schofield*, 243 U.S. 114; *Village of Brookfield* v. *Pentis*, 101 F. 2d 516 (C.A. 7).

very terms, that, in the absence of personal appearance, an adjudication made under it shall be limited to the property which is the subject matter of the action; hence, it authorizes only judgments which are strictly *in rem*. And it has been settled beyond doubt that such service cannot be the basis for any type of personal, and in particular injunctive, relief. *Ladew* v. *Tennessee Copper Co.*, 218 U. S. 357, 368-369, affirming 179 Fed. 245, 252 (C. C. S. D. Tenn.); *General Investment Co.* v. *Lake Shore Ry.*, 260 U. S. 261, 279-281; *Clarke* v. *Boysen*, 39 F. 2d 800, 815 (C.A. 10), certiorari denied, 282 U. S. 869; *Findlay* v. *Florida East Coast Ry. Co.*, 68 F. 2d 540, 542 (C. A. 5), certiorari denied, 292 U. S. 623; *Wilhelm* v. *Consolidated Oil Corp.*, 84 F. 2d 739, 745-746 (C. A. 10); *Dan Cohen Realty Co.* v. *National Savings & Trust Co.*, 125 F. 2d 288, 290 (C. A. 6).[80]

There is no merit to petitioners' claim that this

[80] Petitioners also claim jurisdiction over absent parties pursuant to 28 U.S.C. 1335 and 2361 (Stat. App., pp. 1, 5), because the absent parties had been brought into court by way of interpleader processes issued by other parties. But the nation-wide process in interpleader actions does not support cross-claims between the adverse claimants. *Hagan* v. *Central Avenue Dairy*, 180 F. 2d 502 (C.A. 9); *Great Lakes Auto Insurance Group of Chicago* v. *Shepherd*, 95 F. Supp .1, 3-5 (W.D. Ark.). And it is well established that exceptions to the general rule going back to Section 11 of the Judiciary Act of 1789 (1 Stat. 79) (now embodied in Rule 4(f), Federal Rules of Civil Procedure, and 28 U.S.C. 1391-1392 (Stat. App. pp. 2-3 and p. 28)), *viz.*, that a person shall not be sued in a federal court outside the district or state in which he resides, must be strictly construed. *Ladew* v. *Tennessee Copper Co.*, 179 Fed. 245, 250 (C.C. S.D. Tenn.), affirmed, 218 U.S. 357, 367-368; *Non-Magnetic Watch Co* v. *Association Horlogere*, 44 Fed. 6 (C.C. S.D. N.Y.); *Vidal* v. *South American Securities Co.*, 276 Fed. 855, 867 (C.A. 2).

defect was cured by a general appearance of the Board [81] or by application of *res judicata.*[82]

b. Nor can petitioners seek relief under Section 10 of the Administrative Procedure Act (Stat. (App., p. 5). Order No. 2051, directing the holding of a hearing, is not a final order within the meaning of that section (Sec. 10(c)). Moreover, the District Court for the Southern District of California is not a court of competent jurisdiction. *Blackmar* v. *Guerre,* 342 U. S. 512, 516. And in view of the highly technical and specialized character of the supervision of banks, Order No. 5012 falls in the discretionary class, expressly exempted from judicial revision by the introductory clause of Section 10 of the Administrative Procedure Act.

c. As to the merits of the injunction, it is obvious that the pendency of this action did not shift to the courts supervisory functions allocated by Congress to the Home Loan Bank Board.[83] And it is too

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[81] Petitioners construe the filing with the district court of Order No. 388, terminating the conservatorship, as a general appearance (Pet., p. 15, fn. 3). The filing of this Order plainly had no such effect. Further, Rule 12(b), Federal Rules of Civil Procedure, permits a party to defend a suit on the merits without waiving a reserved challenge to the jurisdiction of the court 2 Moore's *Federal Practice* (2nd ed.), pp. 2260-2264, and the authorities cited there.

[82] Pet. 43. We shall not burden this brief in opposition by a detailed examination demonstrating that the judgments upon which petitioners rely are merely interlocutory decisions or judgments involving different issues and parties. This issue was thoroughly briefed in the court below.

[83] Section 5 of the Home Owners' Loan Act of 1933 (Stat. App., p. 18), dealing with Federal Savings and Loan Associations, has been amended as recently as July 14, 1952, 66 Stat. 604. Congress has not seen fit to change the methods of supervising these associations, although as petitioners have pointed out, this litigation has repeatedly been brought to congressional attention.

well established to warrant detailed discussion that the mere holding of an administrative hearing does not inflict irreparable injury. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-52.

4. Of the many other contentions raised in the petition, we believe that only two require additional discussion. Petitioners claim that since the decision of the Court of Appeals was based primarily on their failure to exhaust their administrative remedy, the opinion should have left room for a retention of the case on the district court docket, rather than call for the outright dismissal of the proceedings. First, it is plain that petitioners have forfeited by now their right to administrative relief. *Yakus* v. *United States*, 321 U.S. 414; *Lichter* v. *United States*, 334 U.S. 742, 792. Apart from this, the question whether or not a case should be retained on the district court docket is a question largely governed by businesslike considerations. *Far East Conference* v. *United States*, 342 U.S. 570, 577. Since judicial review of the administrative determination, if any is had, would be on the administrative record in a court other than the Southern District of California, a dismissal of this case with its unmanageable record obviously is the practical solution.

b. Petitioners claim that the decision below leaves undetermined the claim of the Long Beach shareholders against the Federal Savings and Loan Insurance Corporation.[84] Section 405 of the Na-

[84] Service on the Federal Savings and Loan Insurance Corporation was attempted to be made on the basis of the Federal Interpleader Statutes (28 U.S.C. 1335, 2361). This presup-

tional Housing Act of 1934 (Stat. App., p. 25), however, provides that the insurance of accounts by the Federal Savings and Loan Insurance Corporation becomes due only "in the event of a default by any insured institution." Long Beach is not in default and any claims on this score are premature.

CONCLUSION

This long protracted and baseless litigation should end. The decision below is correct; there is no conflict of decisions; and no need for further review. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL, 1953.

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poses diversity of citizenship as defined in 28 U.S.C. 1332. The Federal Savings and Loan Insurance Corporation, incorporated under a corporation act of Congress, is a citizen of the United States, not of a state. *Bankers Trust Co.* v. *Texas & Pacific Ry. Co.*, 241 U.S. 295, 309-310; *Texas* v. *Interstate Commerce Comm.*, 258 U.S. 158, 160. Hence, the service was ineffective for lack of interpleader jurisdiction.

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INDEX

	Page
Opinions below	1
Jurisdiction	3
Questions presented	3
Statutes and regulations involved	4
Statement	4
Argument	7
Conclusion	16

CITATIONS

Cases:

Adams v. *Nagle*, 303 U.S. 532	11
Appalachian Electric Power Co. v. *Smith*, 67 F. 2d 451, certiorari denied, 291 U.S. 674	14
Blackmar v. *Guerre*, 342 U.S. 512	2, 14
Board of Governors v. *Agnew*, 329 U.S. 441	11
Chicago & Southern Air Lines v. *Waterman Corp.*, 333 U.S. 103	12
Chicago, B. & Q. Ry. Co. v. *Babcock*, 204 U.S. 585	12
Dubil v. *Rayford Camp & Co.*, 184 F. 2d 899	8
Ex Parte Fahey, 332 U.S. 258	3, 6
Fahey v. *Mallonee*, 332 U.S. 245	3, 10
Federal Land Bank v. *Bismarck Co.*, 314 U.S. 95	9
Federal Land Bank v. *Priddy*, 295 U.S. 229	9
Harisiades v. *Shaughnessy*, 342 U.S. 580	12
Hobbs v. *McLean*, 117 U.S. 567	16
Hunter v. *Pittsburgh*, 207 U.S. 161	9
Lambert Co. v. *Baltimore and Ohio R.R. Co.*, 258 U.S. 377	14
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682	14
Oelrichs v. *Spain*, 15 Wall. 211	15
Pawhuska v. *Pawhuska Oil Co.*, 250 U.S. 394	9
Quittner v. *Motion Picture Producers and Distributors of America*, 70 F. 2d 331	15
Rude v. *Buchhalter*, 286 U.S. 451	15
Shields v. *Barrow*, 17 How. 130	14
Sprague v. *Ticonic Bank*, 307 U.S. 161	8, 16
Stark v. *Wickard*, 321 U.S. 288	9
Switchmen's Union v. *National Mediation Board*, 320 U.S. 297	12
Trenton v. *New Jersey*, 262 U.S. 182	9
Trustees v. *Greenough*, 105 U.S. 527	8, 16
United States v. *Bush & Co.*, 310 U.S. 371	12

Cases—Continued

	Page
United States v. *Shaw*, 309 U.S. 495	14
United States v. *U. S. F. & G. Co.*, 309 U.S. 506	14
Vicksburg, S. & P. Ry. Co. v. *Nattin*, 54 F. 2d 712	8
Whelan v. *Manhattan Ry. Co.*, 86 Fed. 219	15
Williamsport Wire Rope Company v. *United States*, 277 U.S. 551	12
Statutes:	
Act of July 14, 1952, 66 Stat. 604	12
Federal Home Loan Bank Act:	
Sec. 3	4, 9, 11, 12
Sec. 6	10
Sec. 7	9
Sec. 10	12
Sec. 12	9
Sec. 17	2, 9
Sec. 25	4, 9, 11
Sec. 26	4, 9, 11
28 U.S.C.:	
Sec. 1655	13
Sec. 1915	15
R. S. 361 (5 U.S.C. 306)	1
Miscellaneous:	
75 Cong. Rec. 14580	12
Federal Rules of Civil Procedure:	
Rule 12(b)	13
Rule 23(b)	8
Rule 25(a)	2
Rule 25(d)	2
Final Report of Attorney General's Committee on Administrative Procedure (1941), p. 143	12
Clark, *Central Banking under the Federal Reserve System*, pp. 52-53	12
2 Moore's *Federal Practice* (2d Ed.), pp. 2260-2264	13
Reed, *The Development of Federal Reserve Policy*, pp. 5-6	12

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 592

WILMINGTON FEDERAL SAVINGS & LOAN ASSOCIATION, AND W. I. GILBERT, JR., FOR THEMSELVES AND ON BEHALF OF FEDERAL HOME LOAN BANK OF LOS ANGELES, AND ITS STOCKHOLDERS, PETITIONERS

v.

HOME LOAN BANK BOARD, WILLIAM K. DIVERS, O. K. LAROQUE, J. ALSTON ADAMS, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, JOHN H. FAHEY, A. V. AMMANN AND GEORGE K. BRAMLEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS FAHEY, AMMANN, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, DIVERS, ADAMS, LAROQUE, HEISLER, AND BRAMLEY IN OPPOSITION[1]

OPINIONS BELOW

a. *Home Loan Bank Board v. Mallonee (the*

[1] The parties represented by the Solicitor General pursuant to R. S. 361 (5 U.S.C. 306) are:

1. A. V. Ammann and George K. Bramley, formerly Conservator and Assistant Conservator, respectively, of Long Beach Federal Savings and Loan Association.

2. William K. Divers, J. Alston Adams, and Kenneth G.

Long Beach action).[2]—The oral opinion of the United States District Court of the Southern District of California (12511 R. 11146-11165) has not been reported. The opinion of the United States Court of Appeals for the Ninth Circuit (12511 R. 11503-11640) has been reported at 196 F. 2d 336.

b. *Fahey v. O'Melveny & Myers (the Los Angeles action).*[3]—The oral opinion of the United States District Court for the Southern District of California (12591 R. 833-847) has not been reported. The opinion of the United States Court of

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Heisler, members of the Home Loan Bank Board, and O. K. LaRoque, former member of the Home Loan Bank Board. The Home Loan Bank Board also has been made a party although it is not a corporate entity authorized by Congress to be sued. Federal Home Loan Bank Act, Sec. 17, as amended by Reorganization Plan No. 3 of 1947, Statutory Appendix, hereafter referred to as Stat. App., pp. 26-28. Cf. *Blackmar* v. *Guerre*, 342 U.S. 512, 515.

3. Federal Savings and Loan Insurance Corporation.

Federal Home Loan Bank of San Francisco, although a federal instrumentality, is represented by private counsel.

John H. Fahey was Home Loan Bank Commissioner and subsequently a member of the Home Loan Bank Board until his resignation on December 20, 1947. Mr. Fahey died on November 19, 1950. His successors in office and the Home Loan Bank Board have been substituted for him under Rule 25(d), Federal Rules of Civil Procedure. On November 20, 1952, Mr. Justice Douglas, in chambers, denied an application by petitioners to vacate the Court of Appeals' stay of proceedings in the district court, so that petitioners might apply to the district court to substitute the members of the Home Loan Bank Board for Mr. Fahey in his personal capacity. 97 L. Ed. Adv. No. 2, p. 117. No attempt, however, has been made to substitute his personal representatives. Accordingly, the action has abated as against Mr. Fahey in his personal capacity (Rule 25(a), Federal Rules of Civil Procedure).

[2] The record of this case will be referred to as "12511 R."

[3] The record of this case will be referred to as "12591 R."

Appeals for the Ninth Circuit (12591 R. 878-1032) is reported at 200 F. 2d 420.

c. Earlier stages of this litigation which have been before this Court include *Fahey* v. *Mallonee*, 332 U.S. 245, and *Ex Parte Fahey*, 332 U.S. 258.

JURISDICTION

a. *Home Loan Bank Board v. Mallonee.*—The judgment of the Court of Appeals was entered on April 2, 1952 (12511 R. 11641-11642). Petitions for rehearing filed on May 1, 1952, were denied on November 13, 1952 (12511 R. 11684). The petition for a writ of certiorari was filed on February 9, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

b. *Fahey v. O'Melveny and Myers.*—The judgment of the Court of Appeals was entered on November 6, 1952 (12591 R. 1033). Petitions for rehearing filed on December 6, 1952, were denied on December 17, 1952 (12591 R. 1036). The petition for a writ of certiorari was filed on February 9, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, since Federal Home Loan Banks are heavily subsidized instrumentalities of the Federal Government and the Act creating such banks expressly reserves to the Home Loan Bank Board the power to readjust their districts and to terminate their corporate existences, such banks and their members have vested rights to their continued corporate existences.

2. Whether the dissolution of a Federal Home Loan Bank can be attacked collaterally in proceedings charging that the dissolution was a fraud on the rights of the corporation and its members.

3. Whether a district court has jurisdiction to maintain an action *in rem* if the complete disposition of the dispute requires positive official action by absent government officials who are not subject and have not submitted to the court's jurisdiction.

4. Whether a district court may award fees to an attorney, prior to the successful conclusion of the lawsuit, out of a fund which does not belong to his client and which was not created by the efforts of the client or his attorney.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations will be found in the separate Statutory Appendix (Stat. App.).

STATEMENT

1. *The underlying litigation.* On March 29, 1946, the Federal Home Loan Bank Commissioner,[4] acting pursuant to Sections 3, 25, and 26 of the Home Loan Bank Act,[5] and finding that the proposed action would "aid the efficient and economic accomplishment of the Act", issued three orders (Nos. 5082, 5083, and 5084; 12511 R. 11614-11617) which readjusted the territory of the Eleventh Federal Home Loan Bank District (Portland)[6] so as to

[4] The predecessor in office of the present Home Loan Bank Board (12511 R. 11611-11612).

[5] Stat. App., pp. 7, 17-18.

[6] The Eleventh District covered the northern part of the Pacific and mountain states.

include the Twelfth District (Los Angeles),[7] moved the Federal Home Loan Bank of Portland to San Francisco and renamed it the Federal Home Loan Bank of San Francisco. The orders also provided for the transfer of the assets, liabilities and members of Los Angeles to San Francisco and for the dissolution of Los Angeles.

On August 22, 1946, a complaint was filed in the United States District Court for the Southern District of California by Los Angeles and six of its member Federal Savings and Loan Associations, including petitioner Wilmington Federal Savings and Loan Association (hereafter referred to as Wilmington), challenging the dissolution of Los Angeles (12511 R. 9465-9497; 9501). The first count of the complaint challenged the dissolution of Los Angeles as an unlawful, unauthorized, and arbitrary act amounting to a fraud upon the rights of the plaintiffs. In the second count, the member associations, suing in behalf of all similarly situated members of Los Angeles, alleged that certain of their individual rights had been injured by the redistricting of Los Angeles. The claims were in substance that the substitution of San Francisco for Los Angeles as bailee and pledgee for securities bailed or pledged with Los Angeles constituted a trespass, a fraud in law, and an invasion of plaintiffs' right. Similar allegations were made with respect to the substitution of San Francisco stock for the Los Angeles stock previously held by them.

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[7] The Twelfth District covered the southern part of the Pacific and mountain states and the Territory of Hawaii.

The complaint was cast in the form of an action to remove a cloud from title; hence, service upon the members of the Federal Home Loan Bank Administration was attempted to be made under 28 U.S.C. 1655 (Stat. App., p. 3).[8]

2. *The order for payment of attorneys' fees forming the basis of this petition.* During the pendency of this action, the district court awarded substantial sums, going into the hundreds of thousands of dollars (12591 R. 980), as interim attorneys' fees, which were paid out of the funds in the registry of the court.[9]

On June 19, 1950, the district court entered an order (12591 R. 288-312) awarding an interim counsel fee of $67,500 to the attorneys for the Los Angeles Bank (O'Melveny and Myers) and of $7,500 to the attorney for petitioner Wilmington (Gilbert). The stated reason for this order was that due process required that the plaintiff corporations be represented by counsel and that the court had the inherent power to make all necessary and appropriate orders to insure due process in the administration of justice (12591 R. 308, 898 fn.). The court ordered that the interim fees totalling

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[8] Our brief in opposition in No. 591 (pp. 5-28) contains a more detailed description of the Federal Home Loan Bank system and of the complex of litigation of which this action (i.e., the so-called *Los Angeles* suit) forms a part.

[9] *Ex Parte Fahey*, 332 U.S. 258, expressly refused to pass on the propriety of the awards and merely held that applicants' grievance was to be pursued by appeal rather than by resort to this Court's original jurisdiction to issue an extraordinary writ.

$75,000 be paid out of funds in the registry of the court (12591 R. 310).[10]

The Court of Appeals reversed the order awarding the counsel fees. It held that, in view of the governmental and peculiar statutory character of the Federal Home Loan Banks, neither they nor their members had a vested interest in their continued existence; that since full relief to the plaintiffs would require official action to be taken by the Home Loan Bank Board, the latter was an indispensable party, and that the court lacked personal jurisdiction over this indispensable party; that the suit was in effect an unconsented suit against the United States; and, finally, that it was improper to award these fees prior to a determination of the merits of the case. It reversed the order with instructions to dismiss the entire action for lack of jurisdiction (12591 R. 1032).

Neither the Los Angeles Bank nor O'Melveny and Myers, its attorneys, nor five out of the six original plaintiff member associations, is seeking review of this judgment.

ARGUMENT

Petitioners seek review of the decision below because, as they allege, it deprives Los Angeles [11] and

[10] These funds were created by the various interpleaders and by the San Francisco impound (see brief in opposition in No. 591, pp. 14-17 and 22-23; 12591 R. 305-306; 883-889).

[11] There is a serious question as to whether restoration of Los Angeles is still open, inasmuch as Los Angeles is not seeking review of the decision below. Petitioners have filed this petition on behalf of Los Angeles. Wilmington's complaint, however, was not brought as a derivative stockholder's action

its stockholders of their rights to the continued existence of the bank. But the decision below, that petitioners had no vested right to the continued existence of the Los Angeles Bank and that indispensable parties were not before the district court, is clearly correct. The answer to petitioners' contentions is that (a) the Home Loan Bank Board had authority to dissolve Los Angeles and that any rights Los Angeles and petitioners had were subject to that power, (b) the complaint constitutes a collateral attack on administrative orders, (c) the complaint fails to state any basis upon which judicial review of the orders can be predicated, and (d) the members of the Home Loan Bank Board are indispensable parties not subject to the *in personam* jurisdiction of the court and not before the court.[12]

1. Despite petitioners' contentions, the Federal Home Loan Banks are not private banking ventures. Like the Federal Land Banks, they are instrumentalities of the Federal Government, per-

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(12511 R. 9465, 9485-9493), but to vindicate the injuries allegedly suffered by it individually. It does not contain any of the sworn statements required by Rule 23(b), Federal Rules of Civil Procedure. For the sake of convenience, and because of its effect upon the *Mallonee* action (see No. 591), we shall assume, without conceding, that the question of the restoration of Los Angeles is still in issue.

[12] An award of attorneys' fees payable out of funds in the registry of the court is appealable. *Trustees* v. *Greenough*, 105 U.S. 527, 527-528; *Sprague* v. *Ticonic Bank*, 307 U.S. 161, 169. And on such appeal the appellate court may review not only the appropriateness of the award but also the jurisdiction of the trial court over the subject matter and over the parties. *Dubil* v. *Rayford Camp & Co.*, 184 F. 2d 899, 903 (C.A. 9); *Vicksburg, S. & P. Ry. Co.* v. *Nattin*, 54 F. 2d 712 (W.D. La.).

forming important governmental functions. *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 231; *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95, 102.

As we have pointed out in our brief in opposition in No. 591, pp. 7-8, Federal Home Loan Banks are heavily subsidized by the United States Government;[13] in return they are subject to the extensive supervisory powers of the Home Loan Bank Board.[14] Moreover, the Federal Home Loan Bank Act has expressly granted to the Board the power to readjust Federal Home Loan Bank Districts, to terminate the corporate succession of a Bank, and to liquidate or reorganize the Banks if it finds that the efficient and economic accomplishment of the purposes of the Act would be aided by such action.[15]

Congress obviously did not intend to confer upon Los Angeles a privilege of continued corporate existence protected by judicial remedies. Cf. *Stark* v. *Wickard*, 321 U. S. 288, 306. In becoming a member of Los Angeles, Wilmington entered this field of public banking fully aware of the governmental subsidies and the reserved powers of

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[13] At the inception of the litigation, the Federal Government owned more than 51% of the capital stock of Los Angeles (12591 R. 927).

[14] Federal Home Loan Bank Act, Sections 7, 12, 17, Stat. App., pp. 10, 13, 16.

[15] Federal Home Loan Bank Act, Sections 3, 25, 26, Stat. App., pp. 7, 17-18. It will be noted that most governmental instrumentalities and subdivisions have this precarious status even without these express statutory provisions. *Hunter* v. *Pittsburgh*, 207 U.S. 161, 178; *Pawhuska* v. *Pawhuska Oil Co.*, 250 U.S. 394; *Trenton* v. *New Jersey*, 262 U.S. 182.

supervision and modification.[16] It cannot attack the exercise of this expressly reserved power on the ground that it would constitute an unconstitutional confiscation if applied to a completely private and uncontrolled corporation. *Fahey* v. *Mallonee*, 332 U. S. 245, 256.[17]

2. The complaint seeks collaterally to attack administrative orders and does not allege any ground upon which administrative orders of this type are

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[16] This reservation of powers was not confined to the Statutes at Large or the Federal Register. It was incorporated in the basic corporate documents of Los Angeles and of its stockholders. Los Angeles' certificate of incorporation (Sec. 7) provides in express terms that it shall have succession until dissolved by the Federal Home Loan Bank Board under the Federal Home Loan Bank Act or by further Act of Congress (12511 R. 4144, 4147). Similarly, the stock certificates of Los Angeles (12511 R. 9382) provide that they are subject to all the provisions of the Federal Home Loan Bank Act and any amendment or amendments thereof, and are subject to the rules and regulations of the Federal Home Loan Bank Board.

[17] The petition (pp. 23-25) makes an assertion—not contained in the complaint (cf. 12511 R. 9465 to 9496)—to the effect that at the time of its dissolution the stock of Los Angeles had a book value of $132 and that petitioner was deprived of the surplus of $32 per share by the merger of the Los Angeles and Portland districts. Since Wilmington held 84 shares in Los Angeles (12511 R. 9487), this alleged injury amounts to $2,688, a sum which is relatively insignificant considering that Los Angeles had a capital of $46,000,000 (Pet. 2). Moreover, petitioner's claim to the surplus of Los Angeles is of an extremely tenuous nature. Federal Home Loan Bank Act, Section 6(i) (Stat. App., pp. 9-10), indicates that a member of a Federal Home Loan Bank has no right to its undistributed surplus and is entitled only to the return of the cash paid subscription. And changes in the value of the stock are the necessary consequence of the reserved powers to readjust districts and to liquidate or reorganize banks. In any event, the alleged failure to protect petitioner's rights in the surplus of Los Angeles could not make the consolidation of Los Angeles and Portland into San Francisco an utter nullity. That, however, is the theory upon which Wilmington rests its complaint (12511 R. 9466).

judicially reviewable. As pointed out above, the complaint (cf. Pet. 5) is based on the theory that the consolidation of Los Angeles and Portland into San Francisco was void and a "fraud in law" upon plaintiffs' rights and asks for an adjudication to the effect that the orders of the Federal Home Loan Bank Administration did not accomplish a transfer of assets. As we have shown in our brief in opposition in No. 591, pp. 38-41, the law does not permit such collateral attacks upon administrative action.[18]

3. We have also shown in our brief in opposition in No. 591, pp. 41-42, that judicial review of administrative orders issued in the field of banking activities is extremely limited. Moreover, the administrative action involved in the instant case—the readjustment of Federal Home Loan Bank districts [19] and the determination that efficient and economical accomplishment of the purposes of the Act would be aided by the liquidation or reorganization of Los Angeles—is of the type with which courts rarely, if ever, interfere. For these decisions are complex and delicate, and involve large elements of proph-

[18] Inasmuch as Secs. 3, 25, 26 (Stat. App. pp. 7, 17-18) of the Home Loan Bank Act plainly authorize the administrative action here involved, there can be no review on the ground that it was beyond the statutory grant of authority (cf. *Board of Governors* v. *Agnew*, 329 U.S. 441, 444). An allegation that certain acts constituted fraud on the rights of petitioners is not sufficient to permit a collateral attack. *Adams* v. *Nagle*, 303 U.S. 532, 542.

[19] The circumstance that the Home Loan Bank District of San Francisco is substantially identical with the Federal Reserve District of San Francisco and the Ninth Judicial Circuit indicates that readjustment of the Federal Home Loan Bank districts was not capricious.

ecy, specialized knowledge, information, and experience, and rest upon considerations not entirely susceptible of proof or disproof. See Clark, *Central Banking Under the Federal Reserve System*, pp. 52, 53 [20]; cf. *Chicago, B. & Q. Ry. Co.* v. *Babcock*, 204 U. S. 585, 598; *Williamsport Wire Rope Company* v. *United States*, 277 U. S. 551, 559; *United States* v. *Bush & Co.*, 310 U. S. 371, 380; *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 303; *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 111.[21]

4. The court also lacked jurisdiction over indispensable parties. The members of the Home Loan Bank Board have not been served personally in

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[20] It is imperative that the districts be shaped in such a fashion that no single group desiring to obtain easy credit can obtain control of any reserve bank. Reed, *The Development of Federal Reserve Policy*, pp. 5-6. It is not at all improbable that the present dispute is intertwined with differences over the credit policies to be followed in the reconversion period. Political opposition to such readjustments was also expected. Congress therefore placed the authority for redistricting with the Board, hoping that it could remain free from political interference. 75 Cong. Rec. 14580.

[21] That federal control of banking involves "a congeries of imponderables * * * calling for almost intuitive special judgments" has been brought to the attention of Congress. Final Report of the Attorney General's Committee on Administrative Procedure (1941), p. 143. And it is significant that although the administrative action here attacked has been twice investigated by Congress and although Section 3 of the Home Loan Bank Act has been amended as recently as July 14, 1952 (66 Stat. 604), Congress has not curtailed the powers of the Home Loan Bank Board under Secs. 3, 25, and 26 of the Act.

The petitioners' reliance upon the Administrative Procedure Act is, in addition, misplaced since the instant proceedings were instituted prior to its effective date, *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 583, and also in view of the essentially discretionary nature of the action sought to be reviewed. See Section 10 (Stat. App., p. 5).

California and have not submitted to the jurisdiction of the district court.[22] Service upon them was obtained solely pursuant to 28 U.S.C. 1655 (Stat. App., p. 3).[23] As we have pointed out in our brief in opposition in No. 591, pp. 42-43, such service supports only an adjudication limited to the property which is the subject matter of the proceedings; it does not confer jurisdiction upon the court to direct a judgment which requires the absent party to take any action.

A judgment limited to the enforcement of property rights, moreover, would not finally or completely dispose of this litigation. To the contrary, the dispute would remain suspended in mid-air unless the absent members of the Home Loan Bank Board take a number of steps which only they, and no one else, can perform. In order to be effective, the relief sought in the complaint requires the restoration and reactivation of Los Angeles and Portland, the dissolution of San Francisco, the readjustment of the Federal Home Loan Bank districts in the Pacific coast area, the appointment of new public directors for the reestablished banks in Los Angeles and Portland, the segregation of San

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[22] Under Rule 12(b) a challenge to the jurisdiction of the court is not waived by coupling it with defenses to the merits. Hence, the circumstance that the absent members participated in the defense in the several actions no longer operates as a general appearance. 2 Moore's *Federal Practice* (2d Ed.) pp. 2260-2264 and the authorities cited there. The cases cited by petitioners in support of their theory of waiver were decided prior to the effective date of the Federal Rules of Civil Procedure. See also *infra*, fn. 24, p. 14.

[23] See also our brief in opposition in No. 591, p. 43, fn. 80.

Francisco's assets, and the conduct of elections. These are but a few of the necessary steps which would not flow automatically from a decree, but would require either positive action by the Home Loan Bank Board or its consent under Section 12 of the Home Loan Bank Act. A decree which does not or cannot provide for such additional relief would "leave the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields* v. *Barrow*, 17 How. 130, 139. Necessarily, the Board members are indispensable parties. Since complete relief would require an *in personam* decree against them and since the court has no personal jurisdiction over them, the complaint is subject to dismissal. *Blackmar* v. *Guerre*, 342 U.S. 512. And, since the complete relief sought in the complaint would require the taking of official, discretionary action by government agencies, the proceedings are, in effect, an unconsented suit against the United States.[24] *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 691n, 693. Lack of jurisdiction on that ground cannot be cured by waiver (*United States* v. *Shaw*, 309 U.S. 495, 501) or through application of the doctrine of *res judicata* (*United States* v. *U.S.F. & G. Co.*, 309 U.S. 506, 514).

5. We have shown that the complaint is fatally defective as a matter of substance as well as for

[24] It was pointed out in *Appalachian Electric Power Co.* v. *Smith*, 67 F. 2d 451, 457 (C.A. 4), certiorari denied, 291 U.S. 674, that a suit to remove a cloud from title may not be used to test the validity of governmental action; and see *Lambert Co.* v. *Baltimore and Ohio R. R. Co.*, 258 U.S. 377, 381-383.

jurisdictional defects. Petitioner Gilbert, however, claims that he is entitled to the attorney's fee awarded to him regardless of the ultimate success or failure of the action.

The theory underlying the district court's order awarding the attorney's fees was that due process required adequate representation of all litigants before the court and that the court had the inherent powers necessary to carry out those requirements of due process (*supra*, pp. 6-7).[25] 28 U.S.C. 1915 (Stat. App., p. 4) contains detailed regulation of proceedings in *forma pauperis*. The privilege is limited to citizens and does not include corporations. *Quittner* v. *Motion Picture Producers and Distributors of America*, 70 F. 2d 331, 332 (C.A. 2). Attorneys requested to represent the poor person are entitled to compensation only out of the funds actually recovered by him. *Whelan* v. *Manhattan Ry. Co.*, 86 Fed. 219, 221 (C.C. S.D. N.Y.). It is difficult to harmonize the coexistence of the broad inherent powers claimed by the district court with this narrow express statutory provision.

Moreover, the award here of interim fees, regardless of the final outcome of the litigation, conflicts with the basic rule that an attorney must look for compensation only to the party employing him. *Oelrichs* v. *Spain*, 15 Wall. 211, 230; *Rude* v. *Buchhalter*, 286 U.S. 451, 459.

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[25] Since there are five other members of Los Angeles suing on behalf of all others similarly situated, it would seem that there was little need for the active participation of Wilmington in the proceedings.

There are exceptions to this rule, especially where a party representing a class has by its efforts succeeded in creating a fund [26] which will inure to the benefit of the entire class. In those circumstances the fees of the counsel for the successful party may be charged against the entire fund. But even this exception presupposes success in the litigation and does not permit the award of interim fees while the outcome of the litigation is still in doubt. *Trustees* v. *Grenough,* 105 U.S. 527, 537; *Hobbs* v. *McLean,* 117 U.S. 567, 581-582; *Sprague* v. *Ticonic Bank,* 307 U.S. 161, 167.

CONCLUSION

The decision below is correct; there is no conflict of decisions and no need for further review. It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

WARREN E. BURGER,
Assistant Attorney General.

SAMUEL D. SLADE,
HERMAN MARCUSE,
Attorneys.

APRIL, 1953.

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[26] The funds in the registry of the court out of which the attorney's fees were paid represent money paid into court as the result of interpleaders and the San Francisco impound (*supra*, p. 6). None of these funds was obtained as the result of Wilmington's efforts, and not even by the widest stretch of imagination can any of Wilmington's funds be traced into the registry of the court. Cf. Pet., p. 10.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 280388 1448

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 593

HOME INVESTMENT CO., PETITIONER

v.

JOHN H. FAHEY, HOME LOAN BANK BOARD, FEDERAL SAVINGS & LOAN INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENTS FAHEY, AMMANN, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, DIVERS, ADAMS, LA ROQUE, HEISLER, AND BRAMLEY IN OPPOSITION

The background of this petition has been set forth in our brief in opposition in No. 591, to which reference is hereby respectfully made.

The facts peculiar to this petition may be summarized as follows. Shortly after the appointment of the conservator, mortgages held by Long Beach on 174 lots owned by petitioner became due and payable. Petitioner tendered the final payments to the conservator, who thereupon requested the trustee under the mortgage deed to execute the

necessary releases. The trustee, Title Service Company, the *alter ego* of the management of Long Beach, claimed to have received instructions from Long Beach, *i. e.,* from itself, not to honor any requests from the conservator. Interpleader and intervention proceedings followed (see brief in opposition in No. 591, pp. 14-17). The actual machinery for settling these disputes was that the conservator and the former Long Beach management both instructed the trustee to reconvey the property to the borrower, who thereupon paid the money into court and received his reconveyance from the trustee. This was followed by an unnecessary and therefore redundant court order (12511 R. 523-533). This procedure was followed in about fifty cases while Long Beach was in the hands of the conservator.

The termination of the conservatorship put an end to the conflict of authority between the conservator and the management of Long Beach. The question as to whether the notes and trust deeds had been pledged validly to San Francisco was obviated, in so far as petitioner is concerned, shortly thereafter by the return of these securities to Long Beach (see brief in opposition No. 591, pp. 22-23).[1]

The decision of the Court of Appeals below indicated that petitioner's interpleader should have been dismissed because it sought collaterally to attack administrative action which the party directly affected could not have reviewed because of its

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[1] See particularly brief in opposition in No. 591, p. 23, n. 50. The San Francisco Bank's claim is for the recognition of a lien upon the property of Long Beach, and not upon the property of any borrower from Long Beach.

failure to exhaust its administrative remedy.[2] (12511 R. 11581-11582).

We submit that the decision below is correct and does not place any hardship upon petitioner since its payments to the conservator, who was at least a *de facto* officer, are protected under settled doctrine (see Brief in Opposition in No. 591, pp. 37-38). Beyond that, the decision below does not aggrieve petitioner nor any other person who took a mortgage from Long Beach. It will be noted that the proposed mandate submitted by the appellants in the court below (respondents here) (12511 R. 11642) does not make any reference to the proceedings brought by the homeowners and does not ask for the return to San Francisco of the pledges, notes, and trust deeds. Moreover, the trust deeds were reconveyed by the trustee pursuant to instructions given to him by the only two persons who possibly could have authority to do so; the homeowners' record title is clear regardless of the validity of the court proceedings.

The foreclosure proceedings referred to on page 37 of the petition do not affect petitioner's interest in any way. They were brought by San Francisco to enforce the notes given by Long Beach, and we repeat that San Francisco disclaims any rights to the pledged notes and trust deeds. There is no danger that petitioner or any other homeowner might be subjected to double payment or conflicting claims.

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[2] Petitioner, as an interested party, could have asked for leave to intervene in the administrative proceeding (12511 R. 11629).

In any event, the alleged adverse claims never presented a proper case for the exercise of the federal interpleader jurisdiction under 28 U. S. C. 1335. Prior to the termination of the conservatorship, the issue was not who owned the notes and trust deeds but who had the right to act for Long Beach. A dispute as to the person who properly represents a corporation does not present a proper case for an interpleader. *Amstelbank, N. V.* v. *Guaranty Trust Co.,* 177 Misc. 548; *Koninklijke Lederfabriek "O."* v. *Chase National Bank,* 177 Misc. 186, 191, affirmed, 263 App. Div. 815.

On the other hand, the claim that, in view of the contested validity of the pledge of the notes and trust deeds to San Francisco, the homeowners are confronted with two adversely claiming mortgagees, does not give rise to interpleader jurisdiction under 28 U. S. C. 1335, since the alleged adverse claimants, both federal corporations, do not have the required diversity of citizenship (see brief in opposition in No. 591, p. 43, fn. 80).

For the above reasons and for the reasons set forth in our briefs in opposition in Nos. 591 and 592, we respectfully submit that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

APRIL, 1953.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 594

ERNEST R. UTLEY, AS RECEIVER FOR FEDERAL HOME LOAN BANKS OF LOS ANGELES, PORTLAND, OR SAN FRANCISCO, WHICHEVER EXISTS, PETITIONER

v.

JOHN H. FAHEY, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENTS FAHEY, AMMANN, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, DIVERS, ADAMS, LA ROQUE, HEISLER, AND BRAMLEY IN OPPOSITION

This petition is closely related to the litigation described in more detail in the briefs in opposition in Nos. 591 and 592, to which reference is respectfully made.

Petitioner is a receiver appointed for the limited

purpose of preserving property on deposit in the district court (Pet. 2). The theory underlying petitioner's appointment is that there might be claims against the conservator (Ammann), his bonding company, and the Federal Savings and Loan Insurance Company, arising from Ammann's management of Long Beach (Pet. 11-12). Moreover, since it was asserted that the identity of the true owners of the claim was alleged to be uncertain so long as the validity of the dissolution of the Los Angeles Bank and the creation of the San Francisco Bank remained undecided, petitioner was styled as indicated in the caption (Pet. 3).

The appointment took place on March 15, 1952 (Pet. 2), when both the *Los Angeles* and *Long Beach* cases were pending on appeal to the Court of Appeals. Petitioner was not a party to either appeal, except that he filed a petition for rehearing in the *Los Angeles* case, which was denied (Pet. 16).[1]

Not having been a party to the proceedings below, petitioner has no standing to file a petition for a writ of certiorari. *Bayard* v. *Lombard,* 9 How. 529, 550, 551; *Payne* v. *Niles,* 20 How. 219, 221; *Louisiana* v. *Jack,* 244 U. S. 397, 402; *Posner* v. *Anderson,* 293 U. S. 531.

It also appears (Pet. 16, 36) that petitioner is essentially concerned with the dismissal of the *Los Angeles* complaint with the result that any funds

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[1] Petitioner has expressly disclaimed any intention of becoming a party to the *Long Beach* proceedings (12511 R. 11645, 11649).

collected by him, as receiver, will go to San Francisco. It is, however, fundamental that a receiver, as an indifferent stakeholder, may not appeal an order deciding who is ultimately entitled to the stake. *Bosworth* v. *Terminal Railroad Association,* 174 U. S. 182; *Grier* v. *Union National Life Ins. Co.,* 217 Fed. 293 (E. D. Pa.); cf. *Spriggs* v. *Stone,* 174 F. 2d 671 (C. A. D. C.).

For these reasons, and for the reasons set forth in our briefs in opposition in Nos. 591 and 592, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

APRIL, 1953.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 595

ROBERT H. WALLIS AND GEORGE TURNER, PETITIONERS

v.

FAHEY, AMMANN AS CONSERVATOR, HOME LOAN BANK BOARD, FEDERAL SAVINGS & LOAN INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENTS FAHEY, AMMANN, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, DIVERS, ADAMS, LA ROQUE, HEISLER, AND BRAMLEY IN OPPOSITION

The facts underlying these petitions have been outlined in our brief in opposition in No. 591, to which reference is respectfully made.

1. Wallis is an attorney representing Long Beach, who received a cashier's check shortly before Long Beach was placed in the hands of the conservator. He filed an interpleader on June 12,

1946 (12511 R. 86-100), alleging that he was subject to conflicting claims since the management of Long Beach insisted that he use the money to defend the Bank against the supervisory action by the Administration authorities in Washington, while the conservator, Ammann, prohibited the use of the funds for these purposes.

The court below indicated that this interpleader should have been dismissed on account of Long Beach's failure to exhaust its administrative remedies. We submit that the decision below was correct for the reasons set forth in our memorandum in No. 593.

In addition, we point out that petitioner's allegations do not bring him within the Federal Interpleader Statute (28 U.S.C. 1335 (Stat. App. p. 1)). The pleading itself states that the Long Beach management does not claim the fund but insists that it belongs to Wallis. The interpleaded parties are therefore not adverse claimants. In any event, this litigation lost all practical importance with the termination of the conservatorship in 1948.

2. The Turner interpleader is even more anomalous. Turner is the lessee of a building owned by Long Beach. One of the charges which led to the appointment of the conservator was that the rent reserved in the lease was inadequate. Five days after the termination of the conservatorship in January 1948, Turner paid into court the rent which had accrued while Long Beach was managed by the conservator and filed a cross-claim in inter-

pleader, averring that the propriety of the lease had been questioned in a stockholders' action filed by Newendorp and Bradley in a state court, allegedly in conspiracy with the former conservator (12511 R. 3477), and asking for a declaration that Turner's lease was a valid one. This obviously does not constitute an interpleader under 28 U.S.C. 1335, for there are no conflicting claimants to the fund deposited in court.

Moreover, the reason for the inclusion of respondents in these proceedings is nebulous unless Turner's seeking of a judicial declaration that his lease from Long Beach was proper was designed to foreclose supervisory action, based on the lease, by the authorities placed by Congress in charge of the supervision of Federal Savings and Loan Associations. Such a suit, however, may not be maintained, for the reasons set forth in our brief in opposition in No. 591, pp. 41-42, 44-45, especially since petitioner Turner has not availed himself of the administrative remedy available to him.[1]

For the above reasons, and for the additional reasons set forth in our briefs in opposition in Nos. 591 and 592, it is respectfully submitted that this petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

APRIL, 1953.

[1] Turner could have intervened in the administrative hearings ordered on June 5, 1946, 12511 R. 11629-11631.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 596

TITLE SERVICE COMPANY, TRUSTEE ON DEEDS OF TRUST OF 8,000 HOMEOWNERS, PETITIONER

v.

FAHEY, AMMANN AS CONSERVATOR, HOME LOAN BANK BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENTS FAHEY, AMMANN, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, DIVERS, ADAMS, LA ROQUE, HEISLER, AND BRAMLEY IN OPPOSITION

The facts underlying this petition have been stated in our brief in opposition in No. 591 and in more detail in our memorandum in No. 593, to which reference is respectfully made.

Petitioner is the trustee of the deeds of trust executed by homeowners who borrowed funds from

Long Beach. It is the *alter ego* of the Long Beach management (12511 R. 11081, 11087, 11519), and its functions are purely formal.[1] After Ammann had been appointed conservator for Long Beach, Title Service received instructions from Ammann to execute reconveyances to homeowners who had paid off their mortgages to him, and "warnings" from the Long Beach management, *i. e.*, from itself, to disregard Ammann's instructions. Title Service thereupon filed interpleader proceedings alleging that it was a trustee confronted with conflicting claims.[2]

The court below indicated that the interpleader should have been dismissed (12511 R. 11577, 11582). We submit that this decision was correct for the reasons set forth in our memorandum in No. 593.[3] There is no possibility that in the future petitioner may be subject to any conflicting claims arising from the conservatorship or to liability for the releases executed in the past.

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[1] If the security given by the homeowners had taken the form of a mortgage rather than that of a trust, the mortgage could have been given directly to Long Beach, obviating the interposition of a trustee.

[2] As we have pointed out in our memorandum in No. 593, p. 4, uncertainty as to who has authority to represent a corporation cannot be the basis of a federal statutory interpleader (28 U.S.C. 1335) authorizing service throughout the United States (28 U.S.C. 2361).

[3] The point made by the court below that Title Service is bound by the failure of Long Beach to exhaust its administrative remedy becomes even more cogent in view of the practical identity between petitioner and the management of Long Beach.

For the above reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

APRIL, 1953.

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TABLE OF CONTENTS

Page

28 U.S.C.:

Section 1332 1
Section 1335 1
Section 1391 2
Section 1392 3
Section 1397 3
Section 1655 3
Section 1915 4
Section 2361 5

Administrative Procedure Act, Section 10 5

Federal Home Loan Bank Act:

Section 3 7
Section 6 8
Section 7 10
Section 12 13
Section 13 14
Section 14 15
Section 17 16
Section 25 17
Section 26 17

Home Owners' Loan Act of 1933, Section 5 18

National Housing Act of 1934, Title IV:

Section 402 24
Section 405 25

Reorganization Plan No. 3 of 1947:

Section 1 26
Section 2 27

Federal Rules of Civil Procedure:

Rule 4(f) 28
Rule 12(b) 28
Rule 23(b) 29

24 C.F.R. (Pocket Supp. 1952) Subtitle B:

Section 144.1(4) 30
Section 148.1 30
Section 148.2 32
Section 148.4 34
Section 149.3 34
Section 149.9 35
Section 150.3 35

The pertinent sections of Title 28 United States Code provide:

§ 1332. Diversity of citizenship; amount in controversy

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

(1) Citizens of different States:

(2) Citizens of a State, and foreign states or citizens or subjects thereof;

(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) The word "States", as used in this section, includes the Territories and the District of Columbia.

§ 1335. Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of

this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

§1391. Venue generally

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do busines or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

(d) An alien may be sued in any district.

§ 1392. Defendants or property in different districts in same State

(a) Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts.

(b) Any civil action, of a local nature, involving property located in different districts in the same State, may be brought in any of such districts.

§ 1397. Interpleader

Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside.

§ 1655. Lien enforcement; absent defendants

In an action in a district court to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain.

* * * * *

If an absent defendant does not appear or plead within the time allowed, the court may proceed as if the absent defendant had been served with process within the State, but any adjudication shall, as regards the absent defendant without appearance, affect only the property which is the subject of the action. When a part of the property is within another district, but within the same state, such action may be brought in either district.

* * * * *

§ 1915. Proceedings in forma pauperis

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

* * * * *

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

* * * * *

§ 2361. Process and procedure

In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.

The Administrative Procedure Act, Section 10, 60 Stat. 237, 243, 5 U.S.C. 1009, provides in pertinent part:

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any

special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every

reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

* * * * *

The Federal Home Loan Bank Act (47 Stat. 725, 12 U.S.C. 1421-1449) provides in pertinent parts:

Section 3, 47 Stat. 726, as amended by the Act of July 14, 1952, sec. 10(c), 66 Stat. 604, 12 U.S.C. 1423:

SEC. 3. As soon as practicable the board shall divide the continental United States, Puerto Rico, the Virgin Islands, Guam, and the Territories of Alaska and Hawaii into not less than eight nor more than twelve districts. Such districts shall be apportioned with due regard to the convenience and customary course of business of the institutions eligible to and likely to subscribe for stock of a Federal Home Loan Bank to be formed under this Act, but no such district shall contain a fractional part of any State. The districts thus created may be readjusted and new districts may from time to time be created by the board, not to exceed twelve in all. Such districts shall be known as Federal Home Loan Bank districts and may be designated by number. As soon as practicable the board shall establish, in each district, a Federal Home Loan Bank at such city as may

be designated by the board. Its title shall include the name of the city at which it is established.

Sec. 6, 47 Stat. 727, 12 U.S.C. 1426:

SEC. 6. (a) As soon as practicable after the enactment of this Act, the board, with the approval of the Secretary of the Treasury, shall determine the minimum capital of each Federal Home Loan Bank which shall be not less than $5,000,000. The board shall, as soon as practicable thereafter, open books in each district established under section 3 for subscription to the capital stock of the Federal Home Loan Bank of the district.

* * * * *

(f) The Secretary of the Treasury shall subscribe, on behalf of the United States, for such part of the minimum capital of each Federal Home Loan Bank as is not subscribed for by members under subsection (c) of this section within thirty days after books have been opened for stock subscriptions as provided in subsection (a). Payments for stock subscriptions by the Secretary of the Treasury shall be subject to call in whole or in part by the board, with the approval of the Secretary of the Treasury, at such time or times as may be deemed advisable. Each Federal Home Loan Bank receiving such payments shall issue receipts therefor to the Secretary of the Treasury, and such receipts shall be evidence of the stock ownership of the United States. The aggregate amount expended by the United States

for the purchase of stock under this Act shall not exceed $125,000,000. The Reconstruction Finance Corporation Act, approved January 22, 1932, is amended by adding at the end of section 2 thereof the following new paragraph:

"In order to enable the Secretary of the Treasury to make payments upon stock of the Federal Home Loan Banks subscribed for by him in accordance with the Federal Home Loan Bank Act, the sum of $125,000,000, or so much thereof as may be necessary for such purpose, is hereby allocated and made available to the Secretary of the Treasury out of the capital of the corporation and/or the proceeds of notes, debentures, bonds, and other obligations issued by the corporation. For the purposes of this paragraph, the corporation shall issue such notes, bonds, debentures, and other obligations as may be necessary."

* * * * *

(h) Stock subscribed for otherwise than by the United States, and the right to the proceeds thereof, shall not be transferred or hypothecated except as hereinafter provided and the certificates therefor shall so state.

(i) Any member may withdraw from membership in a Federal Home Loan Bank six months after filing with the board written notice of intention so to do, and the board may, after hearing, remove any member from membership, or deprive any nonmember borrower of the privilege of obtaining further advances, if, in the opinion of the board, such member or nonmember borrower has failed to comply with

any provision of this Act or the regulations of the board made pursuant thereto or if, in the opinion of the board, such member or nonmember borrower is insolvent. In any such case, the indebtedness of such member or nonmember borrower to the Federal Home Loan Bank shall be liquidated, and the capital stock in the Federal Home Loan Bank owned by such member shall be surrendered and canceled. Upon the liquidation of such indebtedness such member or nonmember borrower shall be entitled to the return of its collateral, and upon surrender and cancellation of such capital stock, the member shall receive a sum equal to its cash paid subscriptions for the capital stock surrendered, except that if at any time the board finds that the paid-in capital of a Federal Home Loan Bank is or is likely to be impaired as a result of losses in or depreciation of the assets held, the Federal Home Loan Bank shall on the order of the board withhold from the amount to be paid in retirement of the stock a pro rata share of the amount of such impairment as determined by the board.

Sec. 7, 47 Stat. 730, as amended by the Act of May 28, 1935, 49 Stat. 294, 12 U.S.C. 1427:

SEC. 7. (a) The management of each Federal Home Loan Bank shall be vested in a board of twelve directors, all of whom shall be citizens of the United States and bona fide residents of the district in which such bank is located.

(b) Four of such directors shall be appointed by the Board and shall hold office for terms of four years; except that the terms of

office of the two such directors heretofore appointed shall expire at the end of the calendar years 1936 and 1937, respectively, and the terms of office of the first two such directors hereafter appointed shall expire at the end of the calendar years 1938 and 1939, respectively.

(c) Six of such directors, two of whom shall be known as class A directors, two of whom shall be known as class B directors, and two of whom shall be known as class C directors, shall be elected as provided in subsection (e), and shall hold office for terms of two years; except that the terms of office of the directors heretofore elected or appointed shall expire at the end of the terms for which they were elected or appointed.

(d) Two of such directors shall be elected by the members of the Federal Home Loan Bank without regard to classes under rules and regulations to be prescribed by the Board, and shall hold office for terms of two years; except that the term of office of one of the directors first elected under this subsection shall expire at the end of the calendar year 1936.

(e) The board shall divide all the members of each Federal Home Loan Bank into three groups which shall be designated groups A, B, and C, which groups shall represent, respectively, and as fairly as may be, group A, the large, group B, the medium-sized, and group C, the small members, the size of such members to be determined according to the aggregate unpaid principal of the member's home mortgage loans. The board may revise the member-

ship of such groups from time to time. Of the directors elected as hereinafter provided, each class A director shall be an officer or director of a member in group A, each class B director shall be an officer or director of a member in group B, and each class C director shall be an officer or director of a member in in group C. Each member shall be entitled to nominate suitably qualified persons for election as directors of the class corresponding to the group to which such member belongs, and shall cast one vote for each director in its class. The directors of each class shall be nominated and elected in accordance with such rules and regulations as may be prescribed by the board.

(f) Any director appointed or elected as provided in this section to fill a vacancy shall hold office only until the expiration of the term of his predecessor.

(g) The board shall designate one of the directors of each bank to be chairman, and one to be vice-chairman, of the board of directors of such bank.

(h) If at any time when nominations are required, members shall hold less than $1,000,000 of the capital stock of the Federal Home Loan Bank, the board shall appoint a director or directors to fill the place or places for which such nominations are required. A director so appointed shall serve until the expiration of the calendar year during which he takes office.

(i) Each bank may pay its directors reasonable compensation for the time required of

them, and their necessary expenses, in the performance of their duties, in accordance with the resolutions adopted by such directors, subject to the approval of the board.

(j) Such board of directors shall administer the affairs of the bank fairly and impartially and without discrimination in favor of or against any member or nonmember borrower, and shall, subject to the provisions hereof, extend to each institution authorized to secure advances such advances as may be made safely and reasonably with due regard for the claims and demands of other institutions, and with due regard to the maintenance of adequate credit standing for the Federal Home Loan Bank and its obligations.

Sec. 12, 47 Stat. 735, 12 U.S.C. 1432:

SEC. 12. The directors of each Federal Home Loan Bank shall, in accordance with such rules and regulations as the board may prescribe, make and file with the board at the earliest practicable date after the establishment of such bank, an organization certificate which shall contain such information as the board may require. Upon the making and filing of such organization certificate with the board, such bank shall become, as of the date of the execution of its organization certificate, a body corporate, and as such and in its name as designated by the board it shall have power to adopt, alter, and use a corporate seal; to make contracts; to purchase or lease and hold or dispose of such real estate as may be necessary or convenient for the transaction of its business,

but no bank building shall be bought or erected to house any such bank, nor shall any such bank make any lease for such purpose which has a term of more than ten years; to sue and be sued, to complain, and to defend, in any court of competent jurisdiction, State or Federal; to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transaction of its business subject to the approval of the board; to define their duties, require bonds of them and fix the penalties thereof, and to dismiss at pleasure such officers, employees, attorneys, and agents; and, by its board of directors, to prescribe, amend, and repeal by-laws, rules, and regulations governing the manner in which its affairs may be administered; and the powers granted to it by law may be exercised and enjoyed subject to the approval of the board. The president of a Federal Home Loan Bank may also be a member of the board of directors thereof, but no other officer, employee, attorney, or agent of such bank, who receives compensation, may be a member of the board of directors. Each such bank shall have all such incidental powers, not inconsistent with the provisions of this Act, as are customary and usual in corporations generally.

Sec. 13, 47 Stat. 735, as amended by the Act of May 28, 1935, 49 Stat. 295, 12 U.S.C. 1433:

SEC. 13. Any and all notes, debentures, bonds, and other such obligations issued by any bank, and consolidated Federal Home Loan Bank

bonds and debentures, shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The bank, including its franchise, its capital, reserves, and surplus, its advances, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that in any real property of the bank shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The notes, debentures, and bonds issued by any bank, with unearned coupons attached, shall be accepted at par by such bank in payment of or as a credit against the obligation of any homeowner debtor of such bank.

Sec. 14, 47 Stat. 736, 12 U.S.C. 1434:

SEC. 14. When designated for that purpose by the Secretary of the Treasury, each Federal Home Loan Bank shall be a depositary of public money, except receipts from customs, under such regulations as may be prescribed by said Secretary; and it may also be employed as a financial agent of the Government; and it shall perform all such reasonable duties as depositary of public money and financial agent of the Government as may be required of it.

Sec. 17, 47 Stat. 736, 12 U.S.C. 1437; cf. Reorganization Plan No. 3 of 1947 (see *infra*, pp. 26-28):

> SEC. 17. For the purposes of this Act there shall be a board, to be known as the "Federal Home Loan Bank Board", which shall consist of five citizens of the United States appointed by the President of the United States, by and with the advice and consent of the Senate. Not more than three members of the board shall be members of the same political party. Each member shall devote his entire time to the business of the board. Before entering upon his duties each of the members shall take an oath faithfully to discharge the duties of his office. The President of the United States shall designate one of the members of the board to serve for a term of two years, one for three years, one for four years, one for five years, and one for six years from the date of the enactment hereof, and thereafter the term of each member shall be six years from the date of the expiration of the term for which his predecessor was appointed. Whenever a vacancy shall occur among the members the person appointed to fill such vacancy shall hold office for the unexpired portion of the term of the member whose place he is selected to fill. Each of the members of the board shall receive a salary at the rate of $10,000 per annum: *Provided*, That during the fiscal year 1933 the salary shall be $9,000 per annum. The President shall designate one of the members as chairman of the board. The chairman shall be the chief executive officer of the board and in his absence or disability the duties of his office

shall be performed by some one of the other members to be designated as acting chairman by the chairman in such order as he may determine. The board shall supervise the Federal Home Loan Banks created by this Act, shall perform the other duties specifically prescribed by this Act, and shall have power to adopt, amend, and require the observance of such rules, regulations, and orders as shall be necessary from time to time for carrying out the purposes of the provisions of this Act. The board shall have power to suspend or remove any director, officer, employee, or agent of any Federal Home Loan Bank, the cause of such suspension or removal to be communicated in writing forthwith to such director, officer, employee, or agent and to such Federal Home Loan Bank.

Sec. 25, 47 Stat. 740, 12 U.S.C. 1445:

SEC. 25. Each Federal Home Loan Bank shall have succession until dissolved by the board under this Act or by further Act of Congress.

Sec. 26, 47 Stat. 740, 12 U.S.C. 1446:

SEC. 26. Whenever the board finds that the efficient and economical accomplishment of the purposes of this Act will be aided by such action, and in accordance with such rules, regulations, and orders as the board may prescribe, any Federal Home Loan Bank may be liquidated or reorganized, and its stock paid off and retired in whole or in part in connection therewith after paying or making provision for the

payment of its liabilities. In the case of any such liquidation or reorganization, any other Federal Home Loan Bank may, with the approval of the board, acquire assets of any such liquidated or reorganized bank and assume liabilities thereof, in whole or in part.

Section 5 of the Home Owners' Loan Act of 1933, 48 Stat. 128, 132, as amended by the Acts of April 27, 1934, Secs. 5, 6, 48 Stat. 645, 646; May 28, 1935, Sec. 18, 49 Stat. 297; Aug. 10, 1939, Title IX, Sec. 909, 53 Stat. 1402; Aug. 6, 1947, 61 Stat. 786; July 3, 1948, Sec. 1, 62 Stat. 1239; Oct. 20, 1951, Title III, Sec. 313(d), 65 Stat. 490; July 14, 1952, Sec. 12, 66 Stat. 604; 12 U.S.C. 1464 and Supp. V, provides in pertinent part:

> SEC. 5. (a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.
>
> (b) Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such

borrowed money as may be authorized by regulations of the Board.

(c) Such associations shall lend their funds only on the security of their shares or on the security of first liens upon homes or combination of homes and business property within fifty miles of their home office: *Provided,* That not more than $20,000 shall be loaned on the security of a first lien upon any one such property; except that not exceeding 15 per centum of the assets of such association may be loaned on other improved real estate without regard to said $20,000 limitation, and without regard to said fifty-mile limit, but secured by first lien thereon: *And provided further,* That any portion of the assets of such associations may be invested in obligations of the United States or the stock or bonds of a Federal Home Loan Bank: *And provided further,* That any such association which is converted from a State-chartered institution may continue to make loans in the territory in which it made loans while operating under State charter. In addition to the loans and investments otherwise authorized, such associations may purchase, subject to all the provisions of this paragraph except the area restriction, loans secured by first liens on improved real estate which are insured under the provisions of the National Housing Act, as amended, or insured as provided in the Servicemen's Readjustment Act of 1944, as amended. Notwithstanding any other provision of this subsection except the area restriction such associations may invest their funds in loans insured under title I of the

National Housing Act, as amended, loans guaranteed or insured as provided in the Servicemen's Readjustment Act of 1944, as amended (except business loans provided by section 503 thereof and not secured by a lien on real estate), or in other loans for property alteration, repair, or improvement: *Provided,* That no such loan shall be made in excess of $1,500 except in conformity to the other provisions of this subsection, and that the total amount of loans so made without regard to the other provisions of this subsection shall not, at any time, exceed 15 per centum of the association's assets.

(d) The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation.

(e) No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions.

(f) Each such association, upon its incorporation, shall become automatically a member of the Federal Home Loan Bank of the district in which it is located, or if convenience shall require and the Board approve, shall become a member of a Federal Home Loan Bank of an adjoining district. Such associations shall qualify for such membership in the manner provided in the Federal Home Loan Bank Act with respect to other members.

(g) The Secretary of the Treasury is authorized on behalf of the United States to subscribe for preferred shares in such associations which shall be preferred as to the assets of the association and which shall be entitled to a dividend, if earned, after payment of expenses and provision for reasonable reserves, to the same extent as other shareholders. It shall be the duty of the Secretary of the Treasury to subscribe for such preferred shares upon the request of the Board; but the subscription by him to the shares of any one association shall not exceed $100,000, and no such subscription shall be called for unless in the judgment of the Board the funds are necessary for the encouragement of local home financing in the community to be served and for the reasonable financing of homes in such community. Payment on such shares may be called from time to time by the association, subject to the approval of the Board and the Secretary of the Treasury; but the amount paid in by the Secretary of the Treasury shall at no time exceed the amount paid in by all other shareholders, and the aggregate amount of shares held by the

Secretary of the Treasury shall not exceed at any time the aggregate amount of shares held by all other shareholders. To enable the Secretary of the Treasury to make such subscriptions when called there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000, to be immediately available and to remain available until expended. Each such association shall issue receipts for such payments by the Secretary of the Treasury in such form as may be approved by the Board, and such receipts shall be evidence of the interest of the United States in such preferred shares to the extent of the amount so paid. Each such association shall make provision for the retirement of its preferred shares held by the Secretary of the Treasury, and beginning at the expiration of five years from the time of the investment in such shares, the association shall set aside one-third of the receipts from its investing and borrowing shareholders to be used for the purpose of such retirement. In case of the liquidation of any such association the shares held by the Secretary of the Treasury shall be retired at par before any payments are made to other shareholders.

(h) Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States (except the taxes imposed by sections 1410 and 1600 of the Internal Revenue Code with respect to wages paid after December 31, 1939, for employment after such date, and ex-

cept, in the case of taxable years beginning after December 31, 1951, income, war-profits, and excess-profits taxes), and all shares of such associations shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States; and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.

* * * * *

(j) In addition to the authority to subscribe for preferred shares in Federal savings and loan associations, the Secretary of the Treasury is authorized on behalf of the United States to subscribe for any amount of full paid income shares in such associations, and it shall be the duty of the Secretary of the Treasury to subscribe for such full paid income shares upon the request of the Federal Home Loan Bank Board. Payment on such shares may be called from time to time by the association, subject to the approval of said Board and the Secretary of the Treasury, and such payments shall be made from the funds appropriated pursuant to subsection (g) of this section; but the amount paid in by the Secretary of the Treasury for shares under this subsection and such subsection (g), together shall at no time exceed

75 per centum of the total investment in the shares of such association by the Secretary of the Treasury and other shareholders. Each such association shall issue receipts for such payments by the Secretary of the Treasury in such form as may be approved by said Board and such receipts shall be evidence of the interest of the United States in such full paid income shares to the extent of the amount so paid. No request for the repurchase of the full paid income shares purchased by the Secretary of the Treasury shall be made for a period of five years from the date of such purchase, and thereafter requests by the Secretary of the Treasury for the repurchase of such shares by such associations shall be made at the discretion of the Board; but no such association shall be requested to repurchase any such shares in any one year in an amount in excess of 10 per centum of the total amount invested in such shares by the Secretary of the Treasury. Such repurchases shall be made in accordance with the rules and regulations prescribed by the Board for such associations.

* * * * *

The National Housing Act of 1934, Title IV, 48 Stat. 1255 ff, 12 U.S.C. 1724-1730, provides in pertinent part:

Sec. 402(a), 48 Stat. 1256, 12 U.S.C. 1725; cf. Reorganization Plan No. 3 of 1947, *infra*, pp. 26-28:

SEC. 402. (a) There is hereby created a Federal Savings and Loan Insurance Corporation (hereinafter referred to as the "Corpora-

tion"), which shall insure the accounts of institutions eligible for insurance as hereinafter provided, and shall be under the direction of a board of trustees to be composed of five members and operated by it under such bylaws, rules, and regulations as it may prescribe for carrying out the purposes of this title. The members of the Federal Home Loan Bank Board shall constitute the board of trustees of the Corporation and shall serve as such without additional compensation. The principal office of the Corporation shall be in the District of Columbia.

* * * * *

Sec. 405, 48 Stat. 1259, as amended by the Acts of June 27, 1950, Sec. 9, 64 Stat. 259, and Sept. 21, 1950, Sec. 5, 64 Stat. 894, 12 U. S. C. 1728:

SEC. 405. (a) Each institution whose application for insurance under this title is approved by the Corporation shall be entitled to insurance up to the full withdrawal or repurchasable value of the accounts of each of its members and investors (including individuals, partnerships, associations, and corporations) holding withdrawable or repurchasable shares, investment certificates, or deposits, in such institution; except that no member or investor of any such institution shall be insured for an aggregate amount in excess of $10,000.

(b) In the event of a default by any insured institution, payment of each insured account in such insured institution which is surrendered and transferred to the Corporation

shall be made by the Corporation as soon as possible either (1) by cash or (2) by making available to each insured member a transferred account in a new insured institution in the same community or in another insured institution in an amount equal to the insured account of such insured member: *Provided,* That the Corporation, in its discretion, may require proof of claims to be filed before paying the insured accounts, and that in any case where the Corporation is not satisfied as to the validity of a claim for an insured account, it may require the final determination of a court of competent jurisdiction before paying such claim.

Reorganization Plan No. 3 of 1947, 61 Stat. 954, 5 U. S. C. (Supp. V 133y-16), provides in pertinent part:

SECTION 1. *Housing and Home Finance Agency.*—The Home Owners' Loan Corporation, the Federal Savings and Loan Insurance Corporation, the Federal Housing Administration, the United States Housing Authority, the Defense Homes Corporation, and the United States Housing Corporation, together with their respective functions, the functions of the Federal Home Loan Bank Board, and the other functions transferred by this Plan, are consolidated, subject to the provisions of sections 2 to 5, inclusive, hereof, into an agency which shall be known as the Housing and Home Finance Agency. There shall be in said Agency constituent agencies which shall be known as the Home Loan Bank Board, the

Federal Housing Administration, and the Public Housing Administration.

SECTION 2. *Home Loan Bank Board.*—(a) The Home Loan Bank Board shall consist of three members appointed by the President by and with the advice and consent of the Senate. Not more than two members of the Board shall be members of the same political party. The President shall designate the members of the Board first appointed hereunder to serve for terms expiring, respectively, at the close of business on June 30, 1949, June 30, 1950, and June 30, 1951, and thereafter the term of each member shall be four years. Whenever a vacancy shall occur among the members the person appointed to fill such vacancy shall hold office for the unexpired portion of the term of the member whose place he is selected to fill. Each of the members of the Board shall receive compensation at the rate of $10,000 per annum.

(b) The President shall designate one of the members of the Home Loan Bank Board as Chairman of the Board. The Chairman shall (1) be the chief executive officer of the Board, (2) appoint and direct the personnel necessary for the performance of the functions of the Board or of the Chairman or of any agency under the Board, and (3) designate the order in which the other members of the Board shall, during the absence or disability of the Chairman, be Acting Chairman and perform the duties of the Chairman.

(c) Except as otherwise provided in subsection (b) of this section there are transferred to the Home Loan Bank Board the

functions (1) of the Federal Home Loan Bank Board, (2) of the Board of Directors of the Home Owners' Loan Corporation, (3) of the Board of Trustees of the Federal Savings and Loan Insurance Corporation, (4) of any member or members of any of said Boards, and (5) with respect to the dissolution of the United States Housing Corporation.

The Federal Rules of Civil Procedure provide in pertinent part:

Rule 4 (f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45.

Rule 12 (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 23 (b) Secondary Action by Shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the

managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

24 C.F.R. (Pocket Supp. 1952) Subtitle B, Regulations Relating to Housing and Housing Credit, provides in pertinent part:

§ 144.1(4) *Members.* All holders of the association's savings accounts and all borrowers therefrom are members. In the consideration of all questions requiring action by the members of the association, each holder of a savings account shall be permitted to cast one vote for each $100, or fraction thereof, of the withdrawal value of his account. A borrowing member shall be permitted, as a borrower, to cast one vote, and to cast the number of votes to which he may be entitled as the holder of a savings account. No member, however, shall cast more than 50 votes. * * *

§ 148.1 *Receiver or conservator; appointment.* (a) Whenever, in the opinion of the Home Loan Bank Board, any Federal savings and loan association:

(1) Is conducting its business in an unlawful, unauthorized, or unsafe manner;

(2) Is in an unsound or unsafe condition, or has a management which is unsafe or unfit to manage a Federal savings and loan association;

(3) Cannot with safety continue in business;

(4) Is impaired in that its assets do not have an aggregate value (in the judgment of the

Home Loan Bank Board) at least equal to the aggregate amount of its liabilities to its creditors, members, and all other persons;

(5) Is in imminent danger of becoming impaired;

(6) Is pursuing a course that is jeopardizing or injurious to the interests of its members, creditors, or the public;

(7) Has suspended payment of its obligations;

(8) Has refused to submit its books, papers, records, or affairs for inspection to any examiner or lawful agent appointed by the Home Loan Bank Board;

(9) Has refused by the refusal of any of its officers, directors, or employees to be examined upon oath by the Home Loan Bank Board or its representative concerning its affairs; or

(10) Has refused or failed to observe a lawful order of the Home Loan Bank Board,

the Home Loan Bank Board may appoint the Federal Savings and Loan Insurance Corporation receiver for such Federal association, which appointment shall be for the purpose of liquidation, or the Home Loan Bank Board may appoint a conservator for such Federal association to conserve the assets of the association pending further disposition of its affairs. The appointment shall be by order, which order shall state on which of the above causes the appointment is based. Any conservator so appointed shall furnish bond for himself and his employees, in form and amount and with surety acceptable to the Governor of

the Federal Home Loan Bank System, or any Deputy or Assistant Governor, but no bond shall be required of the Federal Savings and Loan Insurance Corporation as receiver. The conservator or receiver shall forthwith upon appointment take possession of the association and, at the time such conservator or receiver shall demand possession, such conservator or receiver shall notify the officer or employee of the association, if any, who shall be in the home office of the association and appear to be in charge of such office, of the action of the Home Loan Bank Board. The Secretary of the Home Loan Bank Board shall, forthwith upon adoption thereof, mail a certified copy of the order of appointment to the address of the association as it shall appear on the records of the Home Loan Bank Board and to each director of the association, known by the Secretary to be such, at the last address of each as the same shall appear on the records of the Home Loan Bank Board. If such certified copy of the order appointing the conservator or receiver is received at the offices of the association after the taking of possession by the conservator or receiver, such conservator or receiver shall hand the same to any officer or director of the association who may make demand therefor.

§ 148.2 *Hearing on appointment.* Within fourteen days (Sundays and holidays included) after the appointment of a conservator or receiver for a Federal association not at the time of such appointment in the hands of a conservator, such Federal association, which has not, by its board of directors, consented to or

requested the appointment of a conservator or receiver, may file an answer and serve a written demand for a hearing, authorized by its board of directors, which demand shall state the address to which notice of hearing shall be sent. Upon receipt of such answer and written demand for a hearing the Home Loan Bank Board shall issue and serve a notice of hearing upon the institution by mailing a copy of the order of hearing to the address stated in the demand therefor and shall conduct a hearing, at which time and place the Federal association may appear and show cause why the conservator or receiver should not have been appointed and why an order should be entered by the Home Loan Bank Board discharging the conservator or receiver. Such hearing shall be held either in the district of the Federal Home Loan Bank of which such Federal association is a member or in Washington, D. C., as the Home Loan Bank Board shall determine, unless the association otherwise consents in writing. Such hearing may be held before the Home Loan Bank Board Chairman or before a trial examiner or hearing officer, as the Home Loan Bank Board shall determine. Such Federal association, which has not, by its board of directors, consented to or requested the appointment of a conservator or receiver, may, within seven days (Sundays and holidays included) of such appointment, serve a written or telegraphic demand, authorized by its board of directors, upon the Home Loan Bank Board for a more definite statement of the cause or causes for the action.

The time of service upon the Home Loan Bank Board for the purposes of this section shall be the time of receipt by the Secretary of the Home Loan Bank Board.

§ 148.4 *Discharge of conservator or receiver.* An order of the Home Loan Bank Board discharging a conservator and returning the association to its management shall restore to such Federal association all its rights, powers, and privileges and shall restore the rights, powers and privileges of its officers and directors, all as of the time specified in such order, except as such order may otherwise provide. An order of the Home Loan Bank Board discharging a receiver and returning the association to its management shall by operation of law and without any conveyance or other instrument, act or deed, restore to such Federal association all its rights, powers and privileges, revest in such Federal association the title to all its property, and restore the rights, powers and privileges of its officers and directors, all as of the time specified in such order, except as such order may otherwise provide.

§ 149.3 *Succession.* Immediately upon taking possession, pursuant to § 149.1, of such Federal association, the conservator shall succeed to all the rights, powers and privileges of the Federal association, its officers and directors, or any of them. Such officers and directors, or any of them, shall not thereafter have, exercise, or act in connection with, any such rights, powers or privileges, or any asset or property of any nature of the association:

Provided, however, That nothing in this section shall deny to such officers and directors the right from time to time to address such petitions, authorized by the board of directors, as they may have to the Home Loan Bank Board or its representatives designated to receive such petitions concerning such association, or to represent the association at hearings provided for in the rules and regulations of this subchapter.

§ 149.9 *Final discharge and release of conservator*—(a) *Final report.* At such time as the conservator be relieved of his duties, the conservator shall file with the Home Loan Bank Board a detailed report in form satisfactory to the Home Loan Bank Board.

(b) *Final discharge.* Unless otherwise directed by the Home Loan Bank Board, upon the completion of the duties of the conservator or at such time as the conservator shall be otherwise relieved of his duties, an examination and audit may be directed by the Home Loan Bank Board in connection with the report of the conservator hereinbefore required. The accounts of the conservator shall be approved or disapproved, and, if approved, the conservator shall thereupon be given a complete and final discharge and release.

§ 150.3 *Succession.* Immediately upon the posting of the notice on the door of such Federal association as provided in § 150.2 (a), the receiver, by operation of law and without any conveyance or other instrument, act or deed, shall succeed to all the rights, titles, powers and privileges of the Federal association, its

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 658

JOHN D. WILLHOIT, PETITIONER

v.

JOHN H. FAHEY, ET AL., AND FEDERAL HOME LOAN BANK OF SAN FRANCISCO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENTS FAHEY, AMMANN, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, DIVERS, ADAMS, LA ROQUE, HEISLER, AND BRAMLEY IN OPPOSITION

This petition is closely related to the subject matter of the petitions in Nos. 591 and 592, and reference is respectfully made to the description of the litigation set forth in the briefs in opposition in those cases.

Petitioner filed his complaint in intervention in these proceedings, on behalf of himself and also on behalf of all customers of Long Beach similarly

situated (W.R. 3),[1] on September 15, 1952, *i.e.*, at a time when the *Long Beach* and *Los Angeles* actions were both pending in the Court of Appeals. The order permitting the intervention was signed by the District Judge on October 27, 1952 (W.R. 71, 77).

The gist of the 70-page long complaint is that Willhoit is a stockholder and customer of Long Beach, that some of his records kept by him with Long Beach disappeared while Long Beach was managed by the conservator and have not been returned to him as yet, and that he needs those records for the proper preparation of proceedings in the Tax Court of the United States.

Petitioner, who seeks review of the decisions of the Court of Appeals in the Ninth Circuit handed down in the *Long Beach* and *Los Angeles* cases, is faced with the fundamental jurisdictional objection that he is not a party of record to those proceedings. *Bayard* v. *Lombard,* 9 How. 529, 550-551; *Payne* v. *Niles,* 20 How. 219, 221; *Louisiana* v. *Jack,* 244 U.S. 397, 402; *Posner* v. *Anderson,* 293 U.S. 531. And the order permitting intervention made by the district court after the appeals were perfected, while possibly effective as far as the main litigation is concerned, could not add petitioner to the record of those appeals. *Ex Parte National Enameling Co.,* 201 U.S. 156, 162.

The petition itself seems to proceed on two theories. First, that petitioner's rights as a stockholder of Los Angeles have been affected by the

[1] W. R. refers to the record in No. 658.

Court of Appeals' decisions. His rights on that score are adequately represented by the *Mallonee* petition (No. 591). Second, that petitioner's records were lost while Long Beach was in the hands of the conservator. This claim of liability has, of course, no connection with the issues as to whether the appointment of the conservator and the readjustment of the Federal Home Loan Bank districts were valid, and it is difficult to understand how the decisions of the Court of Appeals have prejudiced petitioner's claim for the return of the allegedly withhold records. Finally, a subpoena issued under Rule 44(c) of the Rules of Practice of the Tax Court of the United States would have served the same purposes as the lengthy complaint.

For the above reasons, and those set forth in the briefs in opposition in Nos. 591 and 592, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

APRIL, 1953.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

Nos. 591, 592, 593, 594, 595, 596, and 658

MALLONEE, BUCKLIN, FERGUS, SHAREHOLDERS' PROTECTIVE COMMITTEE, LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, et al.,
Petitioners,

vs.

FAHEY, HOME LOAN BANK BOARD, et al.,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, IN OPPOSITION.

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Subject Index

Page

Opinions below 2

Questions presented 2

Statutes involved 4

Statement 4

Los Angeles action 5

Mallonee action 9

Argument 12

I. The Court of Appeals correctly decided that the Los Angeles action fails to present a claim within the jurisdiction of the District Court 12

A. The former Los Angeles Bank has no justiciable interest in its own continued existence and no standing to maintain a judicial proceeding for its restoration 12

B. Plaintiff savings and loan associations, as members of the former Los Angeles Bank, have no standing to maintain the Los Angeles action 14

C. In any event the Los Angeles action may not be maintained in the District Court for the Southern District of California 18

II. The Court of Appeals correctly decided that the Mallonee action does not present a claim within the jurisdiction of the District Court 19

A. The status of Ammann, as conservator, is fixed and is not open to collateral attack 19

B. The District Court for the Southern District of California is without jurisdiction to determine the validity of the appointment of the conservator 21

C. The Court of Appeals' opinions do not result in the clouding or reclouding of titles of homeowners 25

D. The collateral and ancillary proceedings do not confer jurisdiction upon the District Court in the

officers and directors, or any of them. Such officers and directors, or any of them shall not thereafter have, exercise, or act in connection with, any such rights, titles, powers or privileges, or any assets or property of any nature of the association; *Provided, however,* That nothing in this section shall deny to such officers and directors the right from time to time to address such petitions, authorized by the board of directors, as they may have to the Board or its representatives designated to receive such petitions concerning such association, or to represent the association at hearings provided for in the rules and regulations in this subchapter.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1933 280384 1447

Page

principal Mallonee action nor do they disclose any basis for independent federal jurisdiction..... 29

III. The petitions of the receiver and intervenor fail to disclose any grounds for certiorari 33

Conclusion 37

Table of Authorities Cited

Cases	Pages
Adams v. Nagle, 303 US 532	18, 21, 26
Alabama Power Co. v. Ickes, 302 US 464	17
Amer. Dredging Co. v. Cochrane, 190 F. 2d 106	19
Bankers Trust Co. v. Texas & P. R. Co., 241 US 295, Anno. 88 A.L.R. 873-4	31
Blackmar v. Guerre, 342 US 512	19, 25
Booth v. Clark, 58 US 302	35
Bowerstock Mills & Power Co. v. Joyce, 101 F. 2d 1000	35
Commissioner of Laramie County v. Commissioner of Albany County, 92 US 307	15
Cooper v. O'Connor, 99 F. (2d) 135, cert. den. 305 US 643	21
Deckert v. Independence Shares Corp., 311 US 282	19
Edward Hines Yellow Pines Trustees v. U. S., 263 US 143	15
Ex parte Fahey, 332 US 258	20, 26
Fahey v. Mallonee, 332 US 245	4, 9, 10, 20, 22, 23, 26
Fahey v. O'Melveny & Myers, 200 F. 2d 420	5, 8, 12, 13, 15, 16, 18, 19
Federal Power Comm. v. Arkansas Power & Light Co., 330 US 802	23
Goldsmith v. U. S. Board of Tax Appeals, 270 US 117	23
Gregoire v. Biddle, 177 F. 2d 579	21
Home Loan Bank Board v. Mallonee, 196 F. 2d 336	5, 9, 12, 21, 22, 26, 29, 33
Hunter v. Pittsburgh, 207 US 161	15
Larson v. Domestic and Foreign Commerce Corp., 337 US 682	19
Lehigh Valley R. Co. v. U. S., 188 F. 879	20
Macauley v. Waterman Steamship Corp., 327 US 540	23
Massachusetts v. Mellon, 262 US 447	17
Meccano Limited v. Wanamaker, 253 US 136	19

Pages

Metropolitan Trust Co. v. North Carolina Lumber Co., 162 F. 170 35
Mt. Pleasant v. Beckwith, 100 US 514 15
Myers v. Bethlehem Shipbuilding Corp., 303 US 41..... 23

Orth v. Transit Inv. Corporation, 132 F. 2d 938 (3d Cir.) 19

Peoples Bank v. Fed. Reserve Bank of San Francisco, 58 F. Supp. 25 16
Perkins v. Lukens Steel Co., 310 US 113..... 17

Re Tampa Suburban Railroad Company, 168 US 583..... 19

Seiden v. Larson, 188 F. 2d 661 19
Seattle Electric Co. v. Seattle, R. & S. Ry. Co., 185 F. 365 (9th Cir.) 19
Smith v. Vulcan Iron Works, 165 US 518..... 19
Spalding v. Vilas, 161 US 483 21
Sprunt and Son v. U. S., 281 US 249 15
Stitzel-Weller Distillery Inc. v. Norman, 39 F. Supp. 182.. 31

Tennessee Electric Power Co. v. TVA, 306 US 118..... 17

U. S. v. Corrick, 298 US 435 20
U. S. v. Merchants and Manufacturers Traffic Association, 242 US 178 15
U. S. v. Vacuum Oil Co., 158 F. 536 20

Yakus v. U. S., 321 US 414..... 20

Statutes

Federal Home Loan Bank Act, 12 USC 1421, et seq. .....
.....2, 4, 7, 13, 16
Section 1423 .....5, 13, 14, 15
Section 1426 16
Section 1426(h)(j) 16
Section 1430 28
Section 1445 .....5, 13, 16
Section 1446 ..... 5, 13

Pages

Home Owners' Loan Act of 1933, as amended, 12 USC 1461, et seq. 3, 4, 9, 16
Section 1464(d) 9, 20, 30
12 USC 1464(f) 16
26 USC 1114 36
28 USC 41(28) 30
28 USC 1335 ..... 4, 31, 32
28 USC 1336 30
28 USC 1655 ..... 3, 4, 6, 18, 25
28 USC 2361 ..... 3, 4, 31

Texts

Clark on Receivers (Second Ed.) 803, Section 590 35

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

Nos. 591, 592, 593, 594, 595, 596, and 658

MALLONEE, BUCKLIN, FERGUS, SHAREHOLDERS' PROTECTIVE COMMITTEE, LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, et al.,
Petitioners,

vs.

FAHEY, HOME LOAN BANK BOARD, et al.,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, IN OPPOSITION.

Respondent, Federal Home Loan Bank of San Francisco (hereinafter referred to as San Francisco Bank), hereby adopts and incorporates the statements as to jurisdiction, questions presented, statutes in-

volved, facts and arguments set forth in the several briefs in opposition filed by the Solicitor General of the United States on behalf of other respondents in answer to the petitions for certiorari in Nos. 591-596, inclusive, and 658.

OPINIONS BELOW.

The opinion of the United States Court of Appeals, in Appeal No. 12511, is found in 196 F. 2d at 336. The District Court's preliminary injunction with findings is found in Volume XVIII, pages 8187 through 8537, of the printed record on Appeal No. 12511.

The opinion in Appeal No. 12591 will be found in 200 F. 2d at 420 (Advance Sheet Edition). The District Court's findings of fact, conclusions of law and order re allowance of attorneys' fees on account is found in Volume I, printed record on Appeal No. 12591, pages 288 through 312.

QUESTIONS PRESENTED.

As to Appeal 12591:

(1) Whether the orders of the Home Loan Bank Administration issued March 29, 1946, pursuant to the Federal Home Loan Bank Act, readjusting the 11th Home Loan Bank District and dissolving the Federal Home Loan Bank of Los Angeles, invaded any legally protected rights of the bank or its members so as to give them standing to sue.

As to Appeal 12511:

(2) Whether an action for relief, founded upon the alleged invalidity of an administrative order appointing a conservator of a federal savings and loan association, may be maintained where such association has failed to exhaust an available administrative remedy.

(3) Whether, consistent with the policy of the Home Owners' Loan Act of 1933, the contracts and acts of a conservator of a federal savings and loan association performed before the termination of his appointment may be collaterally attacked in a proceeding to set aside each such act as void or to recover damages allegedly caused thereby or by the appointment of the conservator.

As to the consolidated cases in the District Court:

(4) Whether out-of-state service of process on the members of the Home Loan Bank Board and other non-resident respondents under either Section 1655 or Section 2361 of Title 28 USC gives the District Court jurisdiction to invalidate the administrative orders of March 29, 1946 or the order appointing a conservator of a federal savings and loan association, and whether either section authorizes an injunction, an award of money damages or attorneys' fees, or other judgment *in personam* against respondents.*

*Subsidiary questions presented are:

As to Appeal 12591:

(5) Whether prior to trial and a determination of the merits of the action claimed by plaintiffs to be *quasi in rem* and claimed by defendants to be *in personam*, the District Court is authorized to award attorneys' fees to plaintiffs' attorneys and

STATUTES INVOLVED.

The principal statutes involved are the Federal Home Loan Bank Act, 12 USC 1421, et seq., and Home Owners' Loan Act of 1933, as amended, 12 USC 1461, et seq. Also collaterally involved are Section 1655 and Sections 1335 and 2361 of Title 28 USC. (The validity of the regulations of the Home Loan Bank Administration, in effect at the time of the order appointing the conservator, relating to such appointment is established by the previous opinion of this Court in *Fahey v. Mallonee,* 332 U.S. 245). Pertinent sections of the statutes and of the rules and regulations of the Home Loan Bank Administration are set forth in the appendix.

STATEMENT.

The San Francisco Bank was established as such on March 29, 1946 pursuant to Orders 5082, 5083 and

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particularly whether such fees can be paid from funds on deposit in the registry of the court as to which San Francisco Bank claims a lien for security.

As to Appeal 12511:

(6) Whether following a determination by the District Court that the original complaints, cross-claims and third party complaints failed to state a claim upon which relief could lawfully be granted, the amended pleadings filed by leave of court and purported interventions and interpleaders ancillary to the principal case served to give the court jurisdiction to determine the validity of the order appointing the conservator and of his acts or to make any determination premised upon the presumed invalidity of such appointment notwithstanding the failure and refusal to exhaust available administrative remedies.

5084 of the Home Loan Bank Administration.[1] These orders consolidated the 11th and 12th Federal Home Loan Bank Districts, dissolved the Federal Home Loan Bank of Los Angeles and transferred all its assets, liabilities and memberships to the Federal Home Loan Bank of Portland, the principal office of which was moved to San Francisco. The consolidated institution was thereupon renamed Federal Home Loan Bank of San Francisco (12511 R. 9470-9474).[2] The three administrative orders were issued pursuant to authority expressly granted the Home Loan Bank Administration by Sections 3, 25 and 26 of the Home Loan Bank Act (12 USC 1423, 1445, 1446), and expressly determined in substantially the words of Section 26 of that Act that "the efficient and economical accomplishments of the purposes of the Federal Home Loan Bank Act, as amended, will be aided by the action."

Los Angeles Action.

On August 22, 1946, the former Federal Home Loan Bank of Los Angeles and six savings and loan

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[1]The terms "Home Loan Bank Administration" and "Home Loan Bank Board" and "Board" are used herein interchangeably to refer to the central administrative agency having supervisory control over Home Loan Banks and federally chartered savings and loan institutions, the composition and status of which underwent several changes. See *Home Loan Bank Board v. Mallonee,* 196 F. 2d 342, footnote 3 and *Fahey v. O'Melveny & Myers,* 200 F. 2d 425.

[2]References herein to "12511 R. ....." are to printed record in Court of Appeals in appeal No. 12511; references to "12591 R. ....." are to printed record in Court of Appeals in appeal No. 12591.

associations, former members of that bank and purportedly suing on behalf of all former members thereof, filed in the United States District Court for Southern District of California, Action 5678 (hereinafter referred to as "Los Angeles action"). Named as defendants were the San Francisco Bank, which was served with process in California, and John H. Fahey and others, individually and in their official capacities as officers and employees of the Home Loan Bank administration. None of the defendants other than San Francisco Bank were served with process in California, although orders for substituted service pursuant to 28 USC 1655 were obtained by plaintiffs and service made upon the official defendants in Washington, D. C. (12511 R. 9502-9512). None of such defendants have appeared generally in said action or submitted to the jurisdiction of the United States District Court in and for the Southern District of California.

The Los Angeles complaint alleged that the three administrative orders were issued without notice or hearing, were "wholly punitive and disciplinary" and were illegal, invalid and void; that such orders constituted a cloud and lien upon the title and property of Los Angeles Bank; and prayed for a declaration that the orders were void and of no effect, for the return of all its assets and for an accounting by San Francisco Bank (12511 R. 9475-9476, 9493-9494).

San Francisco Bank immediately and at all appropriate times during the course of the litigation has

objected to the jurisdiction of the United States District Court for the Southern District of California upon the grounds, among others, that the complaint presented no justiciable issue within the jurisdiction of said District Court; that the matters therein set forth were, under the Federal Home Loan Bank Act, within the exclusive jurisdiction of the Home Loan Bank Administration and that there was an absence of indispensable parties.

San Francisco Bank's objections to jurisdiction were consistently overruled by the District Court. The Los Angeles action was subsequently consolidated for all purposes with the "Mallonee action" hereinafter described.

Upon application of counsel for plaintiffs in the Los Angeles action, the District Court entered an order allowing O'Melveny & Myers and Richard Fitz-Patrick, counsel for the former Los Angeles Bank and five of the association plaintiffs, the sum of $67,500.00 on account of attorney's fees and allowing $7500.00 on account of fees to W. I. Gilbert, Jr., who in September 1949 had been substituted as counsel for the sixth association plaintiff, First Federal Savings & Loan Association of Wilmington (hereinafter called "Wilmington Association"). The order awarding fees directed that payment be made out of funds on deposit in the Registry of the Court, in which funds San Francisco Bank claims an interest, as more particularly hereinafter set forth (12591 R. 310). San Francisco Bank and others appealed from the order awarding fees.

Upon appeal the Court of Appeals held that the District Court "was without jurisdiction of the subject matter of the Los Angeles action and without jurisdiction *in personam* over indispensable parties in and to such an action" (*Fahey v. O'Melveny & Myers,* 200 F. 2d 420, 459);[3] that the action "is an unconsented suit against the United States" (*ibid.,* 458); that the three administrative orders in question "did not adversely affect, impair or confiscate 'property rights' represented by association stock ownership in the former Bank of Los Angeles" and "did not constitute an unlawful seizure, confiscation or expropriation of claimed 'private property' or 'property rights' represented by required membership in a Home Loan Bank" (*ibid.,* 470); that the payment of fees to counsel for plaintiffs out of funds on deposit in the Registry of the Court would "be an unlawful invasion of the property rights of the Bank of San Francisco represented by its 'lien rights' against this fund * * *" (*ibid.,* 480); that in any event the award of "fees would only be allowable to the 'prevailing party' after a trial on the merits" (*ibid.,* 480) but that the District Court being without jurisdiction of the Los Angeles action "the order awarding attorneys' fees cannot on any theory be affirmed" (*ibid.,* 480-481). The Court of Appeals therefore directed the dismissal of the Los Angeles action. Of the original parties plaintiff to that action

[3]References herein to the Court of Appeals opinion in *Fahey v. O'Melveny & Myers* (No. 12591) are to pages in advance sheet edition of 200 F. 2d, inasmuch as the permanent bound volume is not yet available.

and their counsel, only Wilmington Association and W. I. Gilbert, Jr. have applied to this Court for certiorari.

Mallonee Action.

On May 20, 1946 the Home Loan Bank Administration issued its order 5254 appointing A. V. Ammann conservator of Long Beach Federal Savings & Loan Association (hereinafter called "Long Beach") in accordance with the provision of the Home Owners' Loan Act of 1933, as amended (12 USC 1461 et seq.) and upon grounds specified by the Administration (12511 R. 8229). On May 27, 1946 three shareholder members of Long Beach, suing derivatively, filed in the United States District Court for the Southern District of California Action 5421 (hereinafter called "Mallonee action") for the removal of the conservator and an accounting (12511 R. 1-25). Long Beach answered substantially admitting the allegations of plaintiffs' complaint and seeking the same relief (12511 R. 302). The principal ground urged by Long Beach and the parties collaborating with it was the alleged unconstitutionality of Section 5(d) of the Home Owners' Loan Act of 1933. This Court sustained the constitutionality of that section in *Fahey v. Mallonee,* 332 U.S. 245, and held that a statutory three judge District Court had erred in holding the section unconstitutional, in ousting the conservator and enjoining his proceedings and in enjoining an administrative hearing (*Home Loan Bank Board v. Mallonee,* 196 F. 2d 336, 356).

San Francisco Bank had been named a third party defendant in the Mallonee action in a third party complaint filed by Long Beach at the time of its original answer. Long Beach and collaborating parties also alleged the invalidity of the three orders establishing the San Francisco Bank. Following the decision in *Fahey v. Mallonee,* supra, plaintiffs and Long Beach, at the suggestion of the District Court (12511 R. 10300) amended their pleadings in an effort to allege that the appointment of the conservator had been fraudulent (12511 R. 2960, 3184). The conservatorship was terminated by order of the Home Loan Bank Board in January, 1948. Ultimately by amendments and supplements filed after the removal of the conservator Long Beach sought an accounting and damages against San Francisco Bank and others on the theory that the appointment of the conservator was void *ab initio* and that all dealings with the conservator by defendants during the period of the conservatorship were illegal and of no effect and constituted conversions of property of Long Beach. Damages were claimed in excess of $30,000,000.00.

During the conservatorship San Francisco Bank had loaned to Long Beach acting through the conservator $7,300,000.00 (later paid down to $6,300,000). The loans were evidenced by four promissory notes of Long Beach executed by the conservator on behalf of the association. These were secured by the pledge of government bonds and of promissory notes of borrowers from Long Beach, each of which was in turn secured by a deed of trust (12511 R. 8403-8404).

Following the removal of the conservator, upon petition of Long Beach alleging that the notes were not binding obligations upon it, the District Court required San Francisco Bank to deposit in the Registry of the Court the promissory notes in the principal amount of $6,300,000.00 together with the collateral securing the same, i.e., government bonds and borrowers' notes and deeds of trust (12511 R. 8399-8525). The District Court then released to Long Beach the borrowers' notes and deeds of trust and "transferred" the lien of San Francisco Bank to the government bonds and so much of the cash on deposit in the Registry of the Court as was necessary to make the total of government bonds and cash equal the principal amount of the four promissory notes with interest (12511 R. 8526-8536).

At all appropriate times San Francisco Bank has objected to the jurisdiction of the District Court in the Mallonee action upon the grounds, among others, that there had been a failure to exhaust administrative remedies; that there was an absence of indispensable parties; that the action constituted an impermissible collateral attack upon the appointment and status of the conservator; and that the complaint, cross claims and third party complaints failed to set forth a claim for relief within the jurisdiction of the District Court.

On December 1, 1949 upon petition of Long Beach and collaborating parties the District Court entered an order restraining and enjoining all defendants and cross-defendants in the consolidated actions from instituting or prosecuting any administrative or legal

proceedings in any forum except the District Court for the Southern District of California (12511 R. 8194, 8306-7). Upon appeal the order was reversed primarily on the ground that plaintiffs and Long Beach had failed to exhaust their administrative remedies and that accordingly the District Court was without jurisdiction to entertain the action or to enjoin administrative or other legal proceedings.

On March 15, 1952, during the pendency of both the appeals above mentioned, the District Court appointed a receiver for the limited purpose of suing upon certain alleged causes of action. A discussion of the circumstances of such appointment is set forth under Section III, infra, page 33.

ARGUMENT.

The petitions for certiorari should be denied for the reason that the decisions of the Court of Appeals in both the Los Angeles action (200 F. 2d 420) and the Mallonee action (196 F. 2d 336) are obviously correct.

I. THE COURT OF APPEALS CORRECTLY DECIDED THAT THE LOS ANGELES ACTION FAILS TO PRESENT A CLAIM WITHIN THE JURISDICTION OF THE DISTRICT COURT.

A. The former Los Angeles Bank has no justiciable interest in its own continued existence and no standing to maintain a judicial proceeding for its restoration.

The Court of Appeals has properly analyzed the question of the rights sought to be asserted by plain-

tiffs in the Los Angeles action as one dependent upon the unambiguous language of the Federal Home Loan Bank Act (12 USC 1421 et seq.). That Act provides for the establishment of a Home Loan Bank Board (hereinafter called Board) which is directed to divide the country into districts, and to establish in each such district a Federal Home Loan Bank at a city designated by the Board. The Board is specifically empowered to readjust districts (12 USC 1423). "Each Federal Home Loan Bank shall have succession until dissolved by the Board under this Act or by further Act of Congress" (12 USC 1445). The Act further empowers the Board to liquidate or reorganize a Federal Home Loan Bank, "whenever the board finds that the efficient and economical accomplishment of the purposes of this Act will be aided by such action", and in connection therewith to permit any other Federal Home Loan Bank to "acquire assets of any such liquidated or re-organized bank and assume liabilities thereof, in whole or in part" (12 USC 1446).[4] The Court of Appeals held that the Act "expresses a clear and definite Congressional purpose and intent to preempt the entire field of banking activities embraced within the terms and provisions of this banking legislation" (*Fahey v. O'Melveny & Myers,* supra, 435) and vested in the Board "wide power and authority to control the affairs and operation of banks in the Home Loan Bank

[4]No contention is made in the Los Angeles action that the Federal Home Loan Bank Act is unconstitutional or contains an unconstitutional delegation of powers to an administrative agency.

System" (*ibid.*, 435); "that the Federal Home Loan Bank Board is clearly an agency of the United States and a branch of the Executive Department of the Government" (*ibid.*, 439); and "that all Federal Home Loan Banks within the System are, and operate as, public banking agencies and instrumentalities of the federal government, and as such have no justiciable (and proprietary) interest in their continued existence" (*ibid.*, 446-447). "Nor did the Act create, or purport to create, any so-called 'proprietary rights' of association members in the continued existence of any Home Loan Bank, or 'rights' of any kind which might be successfully interposed as a bar to ending the existence of a bank if Congress, or the Board (within the terms and conditions imposed by Title 12, USCA, Section 1423) eliminated it by readjusting bank districts" (*ibid.*, 444).

B. Plaintiff savings and loan associations, as members of the former Los Angeles Bank, have no standing to maintain the Los Angeles action.

Plaintiff savings and loan associations have throughout the litigation proceeded upon the erroneous assumption that as members of the former Los Angeles Bank they had not only a proprietary interest in the continued existence of that particular bank but also other asserted "property rights" which were abridged by the three administrative orders complained of in the Los Angeles action. The Court of Appeals in examining this issue has correctly held that none of the association members of the former Los Angeles Bank suffered, as a result of the orders,

the impairment or invasion of any legally protected property right.

Plaintiff associations complained of the loss of voting power as a result of the consolidation of banks (12511 R. 9479)[5]. But the loss of voting power theretofore exercised by Southern California associations as members of the Los Angeles Bank resulted from the readjustment of Home Loan Bank Districts which readjustment is specifically authorized by the Federal Home Loan Bank Act (12 USC 1423) and is the exercise of a purely governmental power in which no association has a justiciable interest. *Mt. Pleasant v. Beckwith,* 100 US 514; *Hunter v. Pittsburgh,* 207 US 161; *Commissioner of Laramie County v. Commissioner of Albany County,* 92 US 307; *Fahey v. O'Melveny & Myers,* 200 F. (2d) 420, 466. The loss of voting power of the Southern California associations was not the result of the invasion of any legally protected right. *Sprunt and Son v. U. S.,* 281 US 249; *Edward Hines Yellow Pines Trustees v. U. S.,* 263 US 143, 147, 148; *U. S. v. Merchants and Manufacturers Traffic Association,* 242 US 178, 188; *Fahey v. O'Melveny & Meyers,* 200 F. (2d) 420, 466.

The transfer of association membership from the former Los Angeles Bank to the San Francisco Bank did not impair or adversely affect any property or other legally protected rights of member associations. The "rights" of members of a Federal Home Loan

[5]As the District Judge in a memorandum opinion (12591 R. 834) characterized the litigation "It is a quarrel apparently over power".

Bank are carefully spelled out in the Federal Home Loan Bank Act (12 USC 1421 et seq.) and the Home Owners' Loan Act of 1933, as amended (12 USC 1461 et seq.) and are to be measured by those statutes. Membership in a Federal Home Loan Bank is required of a federally chartered savings and loan association (12 USC 1464 (f)). Purchase of bank stock is a condition of membership (12 USC 1426) and such stock may not be hypothecated nor transferred except to another member with the consent of the Board (12 USC 1426 (h), (j)). Such stock ownership is not the equivalent of stock ownership in a private corporation and does not confer proprietary interest or a property right of any kind in the bank itself Cf. *Peoples Bank v. Fed. Reserve Bank of San Francisco,* 58 F. Supp. 25[6].

Thus, the fact that the Los Angeles Bank was an instrumentality of the United States and that its members possessed only the limited rights prescribed by statute compels the conclusion that the acts com-

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[6]Whatever right an association has to membership in a Federal Home Loan Bank, "it acquired and has no legal right to continue its membership *in any particular bank*—when the statute vested in the Board the power to dissolve a bank, 12 USCA § 1445, it specifically denied to members any such right."
Fahey v. O'Melveny & Myers, supra 467. "Whatever legal rights and privileges inured to the benefit of association members of Los Angeles by reason of membership in that bank were rights and privileges which they continued to enjoy as members of San Francisco. The 'transfer' of membership from one bank to the other in nowise changed or affected these rights". *ibid.,* 468. "* * * (T)he limited property rights which member associations had in their shares of stock in the Los Angeles Bank were in nowise impaired by the orders in controversy since their membership rights, as defined by statute, have remained unchanged." *ibid.,* 468.

plained of by plaintiffs in the Los Angeles action did not in fact result in injury to any legally protected rights of plaintiffs. Thus neither the plaintiff former bank as such nor the plaintiff members have standing to sue. *Perkins v. Lukens Steel Co.,* 310 US 113; *Tennessee Electric Power Co. v. TVA,* 306 US 118; *Alabama Power Co. v. Ickes,* 302 US 464; *Massachusetts v. Mellon,* 262 US 447.

Nowhere in the several petitions for certiorari do petitioners point to any error in the foregoing analysis, substantially adopted by the Court of Appeals, of the true nature of the character and status of Federal Home Loan Banks under the statute as government instrumentalities and not private corporations, of the non-proprietary character of association membership therein, and of the fact that there has been no invasion or impairment of any legally protected rights of any plaintiffs in the Los Angeles action. It is submitted that no such error exists. The conclusions of the Court of Appeals are unquestionably correct under the clear and unambiguous language of the statutes involved. All references in the petitions to "violation of due process", "unconstitutional seizures", and "seizures and confiscations" are therefore mere catchwords without any legal significance whatsoever in relation to the issues presented, considered and determined on the appeal which this Court is asked to review.

C. In any event the Los Angeles Action may not be maintained in the District Court for the Southern District of California.

Assuming without conceding, that the complaint in the Los Angeles action conceivably discloses the invasion or impairment of any of plaintiff's legally protected rights, the Los Angeles action clearly cannot be maintained in the District Court in southern California. The three orders complained of were official acts of a federal administrative agency (12511 R. 9470-9474), which said agency was and still is located in Washington, District of Columbia.

The Court of Appeals' opinion exhaustively reviews plaintiffs' contentions that the Los Angeles action is merely one to quiet title to property in Southern California and that substituted service under 28 USC 1655 on absent "official defendants" is all that is required. Each of such contentions is found to be without merit. The Court of Appeals correctly concludes that the action necessarily involves a determination of the questioned validity of the three administrative orders complained of (*Fahey v. O'Melveny & Meyers,* supra, 447); that such determination in an action without personal jurisdiction of members of the Board would be an impermissible collateral attack (*Adams v. Nagle,* 303 US 532; *Fahey v. O'Melveny & Myers,* supra, 448); and that in the absence of such personal jurisdiction any decree purporting to determine the validity of the orders would be a nullity. (*Fahey v. O'Melveny & Myers,* supra, 479.) The heart of the Los Angeles action is the alleged invalidity of the administrative orders, which can be attacked only in a direct

action to set them aside and "are valid until set aside in an appropriate judicial proceeding where the administrative authority is brought within the personal jurisdiction of the court." (*ibid.*, 448.)[7] But the members of the Board may be sued only in a proceeding brought in the District Court of the District of Columbia. *Blackmar v. Guerre*, 342 US 512. The Los Angeles action cannot therefore in any event be maintained in the Southern District of California.

II. THE COURT OF APPEALS CORRECTLY DECIDED THAT THE MALLONEE ACTION DOES NOT PRESENT A CLAIM WITHIN THE JURISDICTION OF THE DISTRICT COURT.[8]

A. The status of Ammann, as conservator, is fixed and is not open to collateral attack.

As noted in the preceding statement, the principal Mallonee action has become, since the removal of the conservator in January, 1948, an action to declare void the notes of Long Beach held by San Francisco

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[7]The Court of Appeals also points out that the complaint in the Los Angeles action, properly construed, is "a suit against the United States which cannot be maintained except with its consent which is here withheld. See *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682; *Amer. Dredging Co. v. Cochrane*, 190 F. 2d 106; *Seiden v. Larson*, 188 F. 2d 661." (*Fahey v. O'Melveny & Myers*, 200 F. 2d 420, 458.)

[8]The appeal clearly presented the issue of the District Court's jurisdiction. On appeal from a preliminary injunction, "the jurisdiction of the court below", the "equity of the complaint, the relief granted and all other issues are before" the appellate court. *Orth v. Transit Inv. Corporation*, 132 F. 2d 938, 944 (3d Cir.); *Smith v. Vulcan Iron Works*, 165 U.S. 518; *Re Tampa Suburban Railroad Company*, 168 U.S. 583; *Meccano Limited v. Wanamaker*, 253 U.S. 136; *Deckert v. Independence Shares Corp.*, 311 U.S. 282; *Seattle Electric Co. v. Seattle, R. & S. Ry. Co.*, 185 F. 365 (9th Cir.).

Bank and for damages founded upon the untenable premise that the appointment of the conservator was void *ab initio* and that all dealings between Ammann and defendants during the conservatorship were void, illegal and constituted conversions of property of Long Beach.

At this date there can be no doubt that the foregoing premise, which is basic to all the pleadings of Long Beach and parties collaborating with it, is wholly erroneous. This Court in this very case (*Fahey v. Mallonee,* 332 US 245) has held that it was error for the District Court to have removed the conservator; that Section 5(d) of the Home Owners' Loan Act of 1933 (12 USC 1464 (d)), is constitutional; and that the administrative rules and regulations under which the conservator had been appointed were valid. This Court has further indicated in *Ex parte Fahey,* 332 US 258, 260, that the status of the conservator is now settled. The order appointing the conservator, having been made pursuant to statutory authority, was not void *ab initio* but was valid until "set aside" in an "appropriate judicial proceeding" or terminated by "subsequent order" of the administrative agency. *U.S. v. Corrick,* 298 US 435; *U. S. v. Vacuum Oil Co.,* 158 F. 536 and *Lehigh Valley R. Co. v. U. S.,* 188 F. 879, both approved in *Yakus v. U. S.,* 321 US 414. Nor can the Mallonee action be maintained as one for the cancellation of promissory notes or for the recovery of damages for conversion upon the assumption that the conservator's actions in carrying out his administrative duties were void. Not only would such a pro-

ceeding constitute an impermissible collateral attack upon the status of the conservator (*Adams v. Nagle,* 303 US 532), but none of the conservator's actions in his official capacity and within the general scope of his authority can give rise to a claim for which relief can be granted. *Spalding v. Vilas,* 161 US 483; *Gregoire v. Biddle,* 177 F. (2d) 579; *Cooper v. O'Connor,* 99 F. (2d) 135, cert. den. 305 US 643.

B. The District Court for the Southern District of California is without jurisdiction to determine the validity of the appointment of the conservator.

The Court of Appeals has correctly determined that Long Beach had failed and refused to exhaust an available administrative remedy which was an essential prerequisite to the maintenance of any judicial proceeding to review the validity of the Ammann appointment and hence that the complaint, cross-claims and third party complaints failed to set forth a ground for relief within the jurisdiction of the court. The Court of Appeals makes clear that the administrative order appointing the conservator was unquestionably preliminary and procedural and did not constitute final agency action (*Home Loan Bank Board v. Mallonee,* 196 F. (2d) 336, 375, 380, 382) which would have been subject to judicial review. Plaintiffs not only failed to avail themselves of the prescribed administrative remedy, but they obtained in July, 1946, an injunction restraining the holding of an administrative hearing upon the appointment of the conservator (12511 R. 372). The "refusal of Association to avail itself of the administrative remedy tendered

in May, 1946, * * * deprived it and/or members of the Mallonee-Association group of the legal right to demand and receive at the hands of the Court the relief sought * * *" (*Home Loan Bank Board v. Mallonee,* supra, 378).

The District Court frankly recognized in November, 1947, that under this Court's prior decision (*Fahey v. Mallonee,* 332 US 245) the original pleadings of the Mallonee-Association group "failed to state a claim upon which *any* relief could be granted by a federal court" (*Home Loan Bank Board v. Mallonee,* supra, 378). The Court however permitted the amendment of pleadings to allege in general terms that the appointment of the conservator had been "fraudulent", which the district court and petitioners argue served retroactively to give the district court jurisdiction. But the fact remains, as is recognized by the district court and all parties, that, even after amendment, the central and controlling question of the *Mallonee* case is the validity of Ammann's appointment and of his acts during the conservatorship.

Petitioners' assertions that the Court of Appeals decision conflicts with that of this Court in *Fahey v. Mallonee* are founded upon the theory that the latter authorizes judicial relief "where fraud is alleged". Although the amended pleadings allege generally that certain acts were "fraudulent", they do not contain any specific and direct allegations which constitute a sufficient allegation of fraud. Moreover, the Court of Appeals in exhaustively reviewing the former opinion of this Court (*Home Loan Bank Board v. Mallonee,*

supra, 355-357), correctly interprets the final words of that opinion, i.e. "without prejudice to any other administrative or judicial proceedings which may be warranted by law" as a specific reference by this Court "to further *administrative proceedings* which would eventuate in a final agency determination which decided the validity of * * * the Ammann appointment." (*ibid.* 378.) Thus both opinions indicate that the appointment constituted preliminary agency action and that further action leading to a final administrative determination is essential prior to judicial review. To infer anything else from the *Fahey v. Mallonee* decision of this Court would result in overruling by mere implication the long established line of authorities holding that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.,* 303 US 41, 50-51; *Macauley v. Waterman Steamship Corp.,* 327 US 540; *Goldsmith v. U. S. Board of Tax Appeals,* 270 US 117, 123; *Federal Power Comm. v. Arkansas Power & Light Co.,* 330 US 802.

There having been not only a failure to exhaust administrative remedies but also affirmative action resulting in enjoining tendered administrative review, the Court of Appeals correctly determined that the original pleadings, founded upon the presumed invalidity of Ammann's appointment, failed to state a case within the jurisdiction of the Federal Court. Even after the removal of the conservator when the administrative agency sought again to exercise ad-

ministrative authority, the Long Beach interests sought and obtained a further injunction; the Court of Appeals has correctly ruled that the injunction of December 1, 1949, cannot stand because the District Court was without jurisdiction to entertain the action in which it was entered.

In the absence of the exhaustion of available administrative remedies testing the validity of the Ammann appointment, the District Court was likewise without jurisdiction to entertain an action seeking the cancellation of Long Beach notes held by San Francisco Bank and recovery of damages from respondent San Francisco Bank or other defendants alleged to result from their dealings with the conservator[9]. As previously noted, the order of appointment and Ammann's status thereunder are not subject to collateral attack. The administrative agency which appointed Ammann and the members of the present Home Loan Bank Board whose final administrative determination would, under the Court of Appeals opinion, be subject to judicial review are not person-

[9]This result is not affected by the suggestion of petitioner Willhoit that Order 388 of the Home Loan Bank Board in January 1948 terminating the conservatorship constituted "final" agency action. (No. 658 p. 20) The text of that order is set out in footnote 18 of the Court of Appeals opinion (196 F. 2d 336, 384) and shows on its face that the Board did not purport to examine or pass upon the validity of the original appointment; it cannot therefore constitute an exhaustion of administrative remedies testing the validity of the appointment or final agency action in that respect. The validity of Ammann's acts as conservator are therefore unaffected by the termination of the conservatorship and the termination itself could not result in imposing liability upon San Francisco Bank or other defendants for having dealt with Ammann as conservator during the conservatorship.

ally before the District Court. The only service upon them is a substituted service under 28 USC 1655 which of course does not give the court jurisdiction *in personam.* In any event, personal jurisdiction over such administrative officials is obtainable only in the place of their official residence (Washington, D.C.) and not in Southern California. *Blackmar v. Guerre,* 342 US 512.

C. The Court of Appeals' opinions do not result in the clouding or reclouding of titles of homeowners.

Petitioners erroneously assert that the dismissal of the Mallonee action because of lack of jurisdiction will cloud or recloud the titles of thousands of homeowners. The claim of "cloud on title" is and always has been a spurious issue in this litigation.

The *titles* of homeowners, who borrowed from Long Beach on loans secured by trust deeds of their homes, have never been involved in the litigation nor in any sense clouded thereby.[10] The sole question raised has

[10]Borrowers from Long Beach gave installment promissory notes for the payment of their loans. Each note was secured by a deed of trust on real property of the borrower. Title Service Company (controlled by Long Beach) was the trustee and Long Beach the beneficiary of such trust deeds. Upon full payment of the loan, the borrowers were entitled to a reconveyance of their property. Normally, the beneficiary would instruct the trustee in writing to make such reconveyance.

At the time Long Beach, acting through the conservator, borrowed money from San Francisco Bank, it assigned as collateral security large numbers of the promissory notes of its borrowers together with the deeds of trust securing such notes. Under the terms of the collateral security agreement between Long Beach and the San Francisco Bank and consistent with the general practice followed by the bank with all savings and loan associations for which the bank performs reserve banking functions, Long Beach had the right to substitute collateral and whenever a borrower paid

been whether Ammann as conservator or the former management of the association should on behalf of Long Beach direct Title Service Company, as trustee, to reconvey trust deeds upon repayment of loans by the borrowers. Title Service Company refused to make such reconveyances at the direction of Ammann upon the asserted ground that Long Beach had informed the trustee that the conservator had no authority to act for Long Beach (12511 R. 53). But the status of Ammann as conservator was fixed (*Fahey v. Mallonee,* 332 US 245, *Ex parte Fahey,* 332 US 258) and was not open to collateral attack (*Adams v. Nagle,* 303

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his loan to Long Beach, Long Beach could obtain a release of such borrower's promissory note and deed of trust from San Francisco Bank, and if necessary substitute other collateral adequately to secure its indebtedness to San Francisco Bank. Thus, neither the loans of San Francisco Bank to Long Beach, acting through Ammann, its conservator, nor the litigation had any necessary effect upon the titles of individual home owners.

Long Beach and its affiliated interests have themselves attempted to enmesh the home owners' titles in the litigation by filing notice of *lis pendens* and by proceedings in the District Court to prevent the conservator from effecting reconveyances to home owners during the conservatorship. The Land Title Company, which offered to insure titles without regard to the alleged cloud on title, was promptly and for this reason named a defendant and co-conspirator in the Mallonee action (12511 R. 3033-3039). The District Court required borrowers desiring to pay off their loans to intervene in the Mallonee proceedings, make payment into Court and then receive from Title Service a reconveyance of their trust deeds. Approximately 50 of such intervention proceedings were had resulting in the impound of approximately $1,600,000.00 in cash in the registry of the court (12511 R. 8288-8291 n). The District Court's requirements for such deposit of loan payments made by borrowers ultimately froze so much of Long Beach's capital in the registry of the court as to seriously embarrass the further operation of the association by the conservator. As a further result "the lower court was finally forced to supervise a great many of the details of a modern banking business and thereby face all of the vexations that accompany such an unusual task." (*Home Loan Bank Board v. Mallonee,* 196 F. 2d 336, 370.)

US 532). Accordingly Title Service Company was without any legal authority to refuse to reconvey upon Ammann's instructions and in all probability would not have done so had not Title Service Company at all times been dominated and controlled by the deposed management of Long Beach. Title Service Company, according to the testimony of T. A. Gregory (12511 R. 11077-11088), is a California corporation, organized by the management of Long Beach in 1935, without issued capital stock, with officers and directors substantially identical with those of Long Beach. Title Service Company is therefore but a corporate shell, an *alter ego* of Long Beach.

Since the removal of the conservator in January, 1948, there has been even less basis for asserting that the homeowners' titles are or can be in any way affected by the Mallonee litigation. All that is now required to remove any purported cloud on the title of any home is a direction from Long Beach to Title Service Company, its trustee, for reconveyance.

The reconveyances of title heretofore made by Title Service Company to those borrowers who paid off their loans are not dependent upon the validity of any court orders which were previously entered in the interpleader and intervention proceedings ancillary to the Mallonee action. The lien by way of security was removed by payment of the debt followed by the recording of reconveyance from Title Service Company, the trustee. No one is questioning or can question the validity of those acts. Long Beach is estopped from

questioning them because it consented to the payment of the loans into court and to the reconveyance made by Title Service Company.

Nor does the pending action of San Francisco Bank against Long Beach for recovery of $6,300,000.00 on promissory notes, originally filed in the Superior Court of the State of California, in and for the County of Los Angeles, and upon petition of Long Beach removed to the District Court (motion to remand pending), constitute any possible cloud upon homeowners' titles. Petitioners incorrectly assert that the action is one to foreclose upon homeowners' titles. The State court action of San Francisco Bank, a conformed copy of the complaint in which was filed with the Court of Appeals on April 4, 1952, seeks a judgment for repayment of loans in the aggregate amount of $6,300,000.00, and a decree establishing and enforcing a lien upon so much of the entire assets of Long Beach as is necessary adequately to secure the repayment of such obligation. San Francisco Bank is required by the Home Loan Bank Act to make loans to associations only upon proper and adequate security. It has no authority to make or permit an unsecured loan (*Home Loan Bank Act,* Sec. 10, 12 USC 1430). If, as the Court of Appeals has indicated, the District Court was without jurisdiction to require the impound of the promissory notes in the principal amount of $6,300,000.00 and collateral, and to order the release to Long Beach of certain collateral, San Francisco Bank is clearly entitled to the return of its promissory notes together with so much

of its original and substituted collateral as may still be impounded, and any deficiency of such collateral must be replenished out of other assets of Long Beach, e.g., the cash of Long Beach which is still retained in the registry of the Court. All this can properly and effectively be accomplished by the mandate of the Court of Appeals in connection with the dismissal of the Mallonee action. No legal title of any homeowner who is a past or present borrower from Long Beach would be affected thereby. San Francisco Bank makes no claim upon the property or title of any homeowners; its claim is asserted against the property of Long Beach. Moreover, it should be noted that the State Court action in question is solely against Long Beach and its property and not against any homeowner or any homeowner's property. How such an action could be said to "recloud" or foreclose titles of homeowners is beyond comprehension.

D. The collateral and ancillary proceedings do not confer jurisdiction upon the District Court in the principal Mallonee action nor do they disclose any basis for independent federal jurisdiction.

Among petitioners are Title Service Company (No. 596), Home Investment Company (No. 593) and Robert H. Wallis and George Turner (No. 595) who had filed so-called cross-claims in interpleader in the Mallonee action. A summary of the pleadings of Title Service Company, Wallis, and Home Investment Company is set forth in the Court of Appeals opinion (*Home Loan Bank Board v. Mallonee*, supra, 348-349). The Court of Appeals has correctly character-

ized these purported interpleaders as ancillary and subsidiary to the principal Mallonee action. Each is based on alleged conflicting demands arising during the period of the conservatorship[11] as a result of the dispute between Ammann and the then former management of Long Beach as to who was legally authorized to represent and act for Long Beach. They thus necessarily present the same basic issue as the principal Mallonee action, i.e. the status of Ammann as conservator, the determination of which issue, as heretofore shown, was beyond the jurisdiction of the District Court. "The validity of their [the interpleaders'] claims rested upon the validity of the claims of Association." (*ibid.*, 379.) They thus "failed to tender an issue or issues which presented a claim upon which relief could have been granted by the court". (*ibid.*, 379).

Moreover, the purported crossclaims in interpleader do not disclose any basis for independent federal jurisdiction as interpleaders or otherwise. The alleged conflicting claims as between the conservator and the Home Loan Bank administration on the one hand, and the Long Beach interests on the other, were not between "adverse claimants" in the sense that term is employed in former 28 USC 41(28), now 28 USC 1336. The "claim" of the conservator and the administrative agency was that of supervision and management of Long Beach under Sec. 5(d), Home Owners' Loan Act of 1933, as amended, (12 USC 1464 (d)) and

[11]The Turner "interpleader" was filed subsequent to the removal of the conservator in January 1948.

was not a claim of title to Long Beach property. In any event such purported interpleaders could not have afforded a basis for service upon and the acquisition of *in personam* jurisdiction over non-resident defendants for the purpose of maintaining the complaint and Long Beach's cross-claim for damages and other relief against non-resident defendants. *Stitzel-Weller Distillery Inc. v. Norman,* 39 F. Supp. 182.

The purported Long Beach interpleader of the promissory notes due San Francisco Bank fails to provide a basis for jurisdiction of such interpleader proceeding or of the principal Mallonee action. The motion of Long Beach and the resulting impound in the registry of the District Court of the $6,300,000.00 of promissory notes and collateral securing the same is said to have been necessary because of alleged uncertainty as to whether the San Francisco or Los Angeles Banks exist in addition to Long Beach's attack upon the authority of Ammann to have made the loan transaction and bind Long Beach thereby. As previously noted neither of those issues are within the jurisdiction of the District Court. In addition the alleged adverse claimants, San Francisco Bank and the former Los Angeles Bank, if it can be said to exist for any purpose, is each a citizen of the United States and not of any "state" and there is thus no diversity of citizenship among all the adverse claimants and no basis for federal interpleader (*Bankers Trust Co. v. Texas & P. R. Co.,* 241 US 295, Anno. 88 A.L.R. 873-4; 28 USC 1335, 2361). If the Los Angeles Bank and San Francisco Bank are citizens of any state, they are both

citizens of California and cannot be "adverse claimants" within the meaning of Section 1335. The erroneous impound of property in the Registry of Court, pending the determination of issues over which the Court has no jurisdiction, obviously does not result in investing the Court with such jurisdiction as to either the principal or ancillary proceedings.

Nor does Long Beach's "interpleader" of insurance premiums due the Federal Savings and Loan Insurance Corporation afford a basis for jurisdiction in interpleader or in the principal Mallonee action. The purported insurance premium interpleader is entirely specious; the alleged adverse claimants are the Federal Savings & Loan Insurance Corporation and the shareholder members of Long Beach represented by the Mallonee group, who sue in a derivative capacity. The case is simply one between two corporations upon a debt where it is said that stockholders of the debtor are conflicting claimants who may be interpleaded.

Each of the purported interpleaders not only do not serve in any way to infuse jurisdiction in the District Court in either the Los Angeles or Mallonee actions, but being wholly ancillary and without independent basis for federal jurisdiction they must fall with the principal cases. "If the relief then demanded from the Court by the Mallonee-Association group was improperly and unlawfully granted by the Court, it is certain that the ancillary and subsidiary claims of these litigants which arose only out of claims of Association, were without substance in law. * * * If the

claims of Association were untenable in law, it is obvious that the claims of these litigants could rise no higher than their source." *Home Loan Bank Board v. Mallonee,* supra, 379.

III. THE PETITIONS OF THE RECEIVER AND INTERVENOR FAIL TO DISCLOSE ANY GROUNDS FOR CERTIORARI.

Petitioners "Ernest R. Utley, as receiver for Federal Home Loan Banks of Los Angeles, Portland, or San Francisco, whichever exists" (No. 594) and John D. Willhoit (No. 658) were not parties to the consolidated actions at the time of entry of either of the orders which were appealed to the Court of Appeals and were not parties appellee in the proceedings therein.

The District Court on March 15, 1952, on motion of Wilmington Association, one of the associations plaintiff in the Los Angeles action and over the objection of San Francisco Bank and the official defendants, entered its order appointing a receiver for the limited purpose of filing certain purported actions to protect and conserve the property and assets theretofore deposited in Court (under the so-called interpleaders and interventions previously herein discussed) against the possible bar of the statute of limitations. The motion for appointment, in which Long Beach and collaborating parties joined, alleged and the Court found "that many contentions and claims are made in this consolidated action concerning the validity of said notes [referring to Long Beach notes payable to San

Francisco Bank in principal amount of $6,300,000.00] and the validity and lawfulness of the conduct, transactions and actions of various persons and institutions and occurrences connected with the execution of said notes" and that "among other questions arising and requiring decision on the merits of the within litigation are those concerning the validity of the orders which created or attempted to create the San Francisco Bank." The District Court thus founded its order for appointment of a receiver upon the untenable premises that the validity of both the order appointing the conservator and the orders readjusting bank districts and establishing the San Francisco Bank were matters then within that Court's jurisdiction. The Court did not find a necessity for the appointment of a receiver, but merely that it would be "in the interest of justice" to preserve and protect property on deposit in Court against the possible bar of the statute of limitations.[12]

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[12]Lest this Court be misled, it should be noticed that the Receiver's petition to this Court omits reference to the fact that prior to the motion for appointment of receiver, San Francisco Bank had moved the District Court for leave to file an amended cross-claim in the consolidated action and for modification of the injunction of December 1, 1949 to permit San Francisco Bank to file an action in the State court upon its promissory notes, which modification having been denied was subsequently obtained from the Court of Appeals. San Francisco Bank also declined to follow the District Court's suggestion to name parties other than Long Beach as defendants in its cross-claim and action upon said notes for the reasons that Long Beach is named maker of said notes and solely liable thereon and that practically all other suggested defendants asserted to be possibly liable "by way of an action-over, or otherwise" are non-residents of California as to whom personal jurisdiction could not conceivably be obtained in the California State Court or in the District Court for Southern California.

San Francisco Bank promptly appealed the order appointing the receiver. Said appeal is pending, but neither briefed nor argued before the Court of Appeals. If it is finally established that the Court of Appeals correctly determined that the District Court lacked jurisdiction to entertain either the Los Angeles or Mallonee actions, then the receivership must fall regardless of any questions of necessity or propriety for the receiver's appointment, for the petition for appointment is wholly ancillary and fails to disclose any independent grounds of federal jurisdiction. The receiver as an officer and arm of the Court may not engage in the principal litigation on behalf of either of the parties litigant (*Booth v. Clark,* 58 US 302; *Metropolitan Trust Co. v. North Carolina Lumber Co.,* 162 F. 170, 179; *Bowerstock Mills & Power Co. v. Joyce,* 101 F. (2d) 1000; Clark on Receivers (Second Ed.) 803, Sec. 590).

Petitioner Willhoit filed his complaint in intervention in the consolidated litigation, pursuant to leave granted by the District Court on October 27, 1952, more than six months after the opinion of the Court of Appeals holding that the District Court was without jurisdiction to entertain the principal Mallonee action. Petitioner now complains of the Court of Appeals' order entered November 24, 1952, staying all proceedings in the Court below in the consolidated actions pending determination of appeals 12511 and 12591. Certainly a person seeking to intervene at this late date in litigation which has been before the Court since May, 1946, must accept the case as it exists at

the date of intervention. In view of the April, 1952, opinion of the Court of Appeals, an application for stay could not be said to be an illogical possibility. In fact the granting of the Willhoit petition for intervention was itself a contributing factor impelling these respondents to seek such stay, all efforts to obtain such relief from the District Court having proved unsuccessful. Willhoit was not foreclosed from opposing the proposed stay, but appeared and presented his arguments to the Court of Appeals.

Willhoit is admittedly not a party to either appeal here considered. But for the stay, his interests are in nowise affected and his petition fails to disclose any respect in which the granting of the stay pending final determination of the appeals is erroneous. Moreover, as has been pointed out both to the District Court and Court of Appeals, if Willhoit is actually concerned with recovery of purported records alleged to have been in the custody of Long Beach prior to conservatorship, he misconceives his remedy; in his pending proceeding before the United States Tax Court he has the unquestioned right to obtain from that Court a subpoena of nationwide reach to enable him to locate and obtain any such records (26 USC 1114).

CONCLUSION.

For the foregoing reasons, neither the Los Angeles nor the Mallonee actions present any claims for relief within the jurisdiction of the District Court. Each of the petitions implies that the Court of Appeals' decisions if sustained would adversely affect the stability and functioning of the entire federal home loan bank system, with its several regional banks, its hundreds of savings and loan institutions and thousands of individual member borrowers from such institutions. Quite the reverse is true. The simple, central issue in the consolidated cases is the validity of four administrative orders, issued pursuant to statutory authority which is clear and unambiguous beyond reasonable question. This Court has already confirmed the validity of the order appointing Ammann. The Court of Appeals has followed that decision and held that none of the four administrative orders are subject to collateral attacks of the sort attempted in this litigation before the District Court in Southern California.

The injection of collateral pleadings, far from affording any basis for jurisdiction to maintain either action, is indeed a persuasive ground for directing the dismissal of the entire proceeding. Such collateral proceedings graphically illustrate the use of the Mallonee action and ancillary proceedings first as a means of crippling and rendering impossible the practical continuance of the conservatorship and then as a means of coercing non-resident Government and other defendants by harrassing and vexatious litigation, and thereby requiring them to abandon the Government's

and San Francisco Bank's defenses to money damage claims as a condition of restoring the normal exercise of supervisory authority and banking facilities throughout the entire western United States.

The dismissal of the consolidated action and all its adjuncts pursuant to the opinions of the Court of Appeals will serve to re-establish the supervisory and managerial powers of the Home Loan Bank administration over the important home loan bank system and will enable the administrative agency and the San Francisco Bank to perform their clearly delegated functions and duties to the full extent of the responsibility imposed upon them, without the harrassment of collateral attacks and obstructions of the sort here employed. This is not to say that the government agencies and instrumentalities here involved are to be free of all control or of judicial restraint in an appropriate forum following final administrative action. But it does mean that under the plain language of the statute administrative action is not to be so impaired as to leave either a particular home loan bank or individual savings and loan institutions free of all supervision and control whatever. The Court of Appeals by exhaustive and penetrating analysis of the great "melange of issues" into which the litigation has proliferated has laid bare the few central and controlling issues of the litigation. Petitioners assiduously fail to discuss those issues or to specify any respect in which the Court of Appeals erred in their determination. Repondent San Francisco Bank respectfully submits that the present and future soundness, stability and use-

fulness of the home loan bank system will be enhanced and the public interest will be served by denial of the petitions for writs of certiorari.

Dated, San Francisco, California,
April 15, 1953.

Respectfully submitted,
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(Appendix Follows.)

Appendix

Federal Home Loan Bank Act as Amended
(12 USC 1421 et seq.)

* * * * * * *

Sec. 3. As soon as practicable the board shall divide the continental United States, Puerto Rico, the Virgin Islands, and the Territories of Alaska and Hawaii into not less than eight nor more than twelve districts. Such districts shall be apportioned with due regard to the convenience and customary course of business of the institutions eligible to and likely to subscribe for stock of a Federal Home Loan Bank to be formed under this Act, but no such district shall contain a fractional part of any State. The districts thus created may be readjusted and new districts may from time to time be created by the board, not to exceed twelve in all. Such districts shall be known as Federal Home Loan Bank districts and may be designated by number. As soon as practicable the board shall establish, in each district, a Federal Home Loan Bank at such city as may be designated by the board. Its title shall include the name of the city at which it is established (12 USC 1423).

* * * * * * *

Sec. 25. Each Federal Home Loan Bank shall have succession until dissolved by the board under this Act or by further Act of Congress (12 USC 1445).

Sec. 26. Whenever the board finds that the efficient and economical accomplishment of the purposes of

this Act will be aided by such action, and in accordance with such rules, regulations, and orders as the board may prescribe, any Federal Home Loan Bank may be liquidated or reorganized, and its stock paid off and retired in whole or in part in connection therewith after paying or making provision for the payment of its liabilities. In the case of any such liquidation or reorganization, any other Federal Home Loan Bank may, with the approval of the board, acquire assets of any such liquidated or reorganized bank and assume liabilities thereof, in whole or in part (12 USC 1464(d)).

* * * * * * *

HOME OWNERS' LOAN ACT OF 1933 AS AMENDED ..
(12 USC 1461 et seq.)

* * * * * * *

SEC. 5 (d). The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation (12 USC 1464(d)).

* * * * * * *

FEDERAL HOME LOAN BANK ADMINISTRATION
RULES AND REGULATIONS

(Effective Prior to August 15, 1949; by Reorganization Plan No. 3 of 1947, the Federal Home Loan Bank

Administration, referred to in these regulations, was succeeded by the Home Loan Bank Board.)

* * * * * * *

206.1. *Receiver or conservator, appointment.* Whenever, in the opinion of the Federal Home Loan Bank Administration, any Federal savings and loan association:

(1) is conducting its business in an unlawful, unauthorized, or unsafe manner;

(2) is in an unsound or unsafe condition, or has a management which is unsafe or unfit to manage a Federal savings and loan association;

(3) cannot with safety continue in business;

(4) is impaired in that its assets do not have an aggregate value (in the judgment of the Federal Home Loan Bank Administration) at least equal to the aggregate amount of its liabilities to its creditors, members, and all other persons;

(5) is in imminent danger of becoming impaired;

(6) is pursuing a course that is jeopardizing or injurious to the interests of its members, creditors, or the public;

(7) has suspended payment of its obligations;

(8) has refused to submit its books, papers, records, or affairs for inspection to any examiner or lawful agent appointed by the Federal Home Loan Bank Administration;

(9) has refused by the refusal of any of its officers, directors, or employees to be examined upon

oath by the Federal Home Loan Bank Administration or its representative concerning its affairs; or

(10) has refused or failed to observe a lawful order of the Federal Home Loan Bank Administration, the Federal Home Loan Bank Administration may appoint the Federal Savings and Loan Insurance Corporation receiver for such Federal association, which appointment shall be for the purpose of liquidation, or the Federal Home Loan Bank Administration may appoint a conservator for such Federal association to conserve the assets of the association pending further disposition of its affairs. The appointment shall be by order, which order shall state on which of the above causes the appointment is based. Any conservator so appointed shall furnish bond for himself and his employees, in form and amount and with surety acceptable to the Governor of the Federal Home Loan Bank System, or any deputy or Assistant Governor, but no bond shall be required of the Federal Savings and Loan Insurance Corporation as receiver. The conservator or receiver shall forthwith upon appointment take possession of the association and, at the time such conservator or receiver shall demand possession, such conservator or receiver shall notify the officer or employee of the association, if any, who shall be in the home office of the association and appear to be in charge of such office, of the action of the Federal Home Loan Bank Administration. The Secretary of the Federal Home Loan Bank Administration shall, forthwith upon adoption thereof, mail a certified copy of the order of appointment to the

address of the association as it shall appear on the records of the Federal Home Loan Bank Administration and to each director of the association, known by the Secretary to be such, at the last address of each as the same shall appear on the records of the Federal Home Loan Bank Administration. If such certified copy of the order appointing the conservator or receiver is received at the offices of the association after the taking of possession by the conservator or receiver, such conservator or receiver shall hand the same to any officer or director of the association who may make demand therefor. (Sec. 5 (a), (d), of H.O.L.A. of 1933, 48 Stat. 132, 133; 12 U.S.C. 1464 (a), (d); E.O. 9070, 7 F.R. 1529).

206.2. *Hearing on appointment.* Within fourteen days (Sundays and holidays included) after the appointment of a conservator or receiver for a Federal association not at the time of such appointment in the hands of a conservator, such Federal association, which has not, by its board of directors, consented to or requested the appointment of a conservator or receiver, may file an answer and serve a written demand for a hearing, authorized by its board of directors, which demand shall state the address to which notice of hearing shall be sent. Upon receipt of such answer and written demand for a hearing the Federal Home Loan Bank Administration shall issue and serve a notice of hearing upon the institution by mailing a copy of the order of hearing to the address stated in the demand therefor and shall conduct a hearing, at which time and place the Federal association may ap-

pear and show cause why the conservator or receiver should not have been appointed and why an order should be entered by the Federal Home Loan Bank Administration discharging the conservator or receiver. Such hearing shall be held either in the district of the Federal Home Loan Bank of which such Federal association is a member or in Washington, D. C., as the Federal Home Loan Bank Administration shall determine, unless the association otherwise consents in writing. Such hearing may be held before the Federal Home Loan Bank Commissioner or before a trial examiner or hearing officer, as the Federal Home Loan Bank Administration shall determine. Such Federal association, which has not, by its board of directors, consented to or requested the appointment of a conservator or receiver, may, within seven days (Sundays and holidays included) of such appointment, serve a written or telegraphic demand, authorized by its board of directors, upon the Federal Home Loan Bank Administration for a more definite statement of the cause or causes for the action. The time of service upon the Federal Home Loan Bank Administration for the purposes of this Section shall be the time of receipt by the Secretary of the Federal Home Loan Bank Administration. (Sec. 5 (a), (d), of H.O.L.A. of 1933, 48 Stat. 132, 133; 12 U.S.C. 1464 (a), (d); E.O. 9070, 7 F. R. 1529).

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No. 11757

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HAROLD B. WILL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

Nos. 591, 592, 593, 594, 595, 596, and 658.

MALLONEE, BUCKLIN and FERGUS, SHAREHOLDERS' PROTECTIVE COMMITTEE, and LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, et al., *Petitioners*,

v.

FAHEY, AMMANN, as Conservator, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, et al., *Respondents*.

PETITIONERS' REPLY TO OPPOSITIONS TO CERTIORARI

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SUBJECT INDEX.

	Page
WHY REPLIES NECESSARY	1
I. PROTECTION OF PUBLIC WELFARE REQUIRES CERTIORARI	2
II. RESPONDENTS' FRAUDS MUST BE TRIED	2
III. CONFLICT BETWEEN MARCH 1953 U. S. SUPREME COURT OPINION AND COURT OF APPEALS	6
IV. 8,000 HOMEOWNERS YET THREATENED WITH FORECLOSURE	8
V. CALIFORNIA HOMEOWNERS' TITLES CAN BE CLEARED ONLY BY U. S. DISTRICT COURTS IN CALIFORNIA	13
VI. THE CALIFORNIA DISTRICT COURT HAS PERSONAL JURISDICTION OVER GOVERNMENT RESPONDENTS	15
A. In Interpleader	15
B. Government Respondents Have Made General Appearances In The District Court	15
VII. RESPONDENTS REFUSE ADMINISTRATIVE HEARINGS YET DEMAND DISMISSAL FOR "FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES"	19
VIII. ACTION FOR RETURN OF SEIZED SAVINGS AND ACCOUNTING IS NOT A COLLATERAL ATTACK ON CONSERVATOR'S APPOINTMENT	20
IX. ANSWER TO CHARGES AGAINST MANAGEMENT	20
X. SUPERVISION MUST NOT MEAN DESTRUCTION	23
XI. FEDERAL SAVINGS DEPOSIT INSURANCE NULLIFIED	24
XII. JURISDICTION OF U. S. DISTRICT COURT IS RES JUDICATA	24
XIII. PETITIONERS HAVE STANDING TO SUE AND A JUSTICIABLE INTEREST TO PROTECT	25
CONCLUSION	30

Page

TABLE OF AUTHORITIES CITED.

Cases.

American Bank v. Federal Reserve Bank of Atlanta, 256 U.S. 350, 65 L. Ed. 983 5
Board of Governors of The Federal Reserve System v. Agnew, 329 U. S. 441, 91 L. Ed. 408.....27, 29
Ex Parte Fahey, 332 U. S. 258, 91 L. Ed. 2041..... 21
Fahey, et al. v. Mallonee, et al., 332 U. S. 245, 91 L. Ed. 2030 5
Hynes v. Grimes Packing Co., 337 U. S. 86, 93 L. Ed. 1231 30
Joint Anti Fascist v. McGrath, 341 U. S. 123, 95 L. Ed. 817 .....27, 29
Land v. Dollar, 330 U. S. 731, 91 L. Ed. 1209 .....26, 29
Seven Oaks v. F.H.A., 171 F. (2d) 947..... 14
Stark v. Wickard, 321 U. S. 288, 88 L. Ed. 733 .....27, 29
Swift v. U. S., 276 U. S. 311, 73 L. Ed. 587.....12, 17
Treinies v. Sunshine Mining Co., 308 U. S. 66, 84 L. Ed. 85 13
Unexcelled Chemical Corp. v. U.S.A., October Term, 1952, No. 293, decided March 9, 1953, 97 Adv. L. Ed. No. 9, page 486 ..... 1, 6
United States v. I. C. C., 337 U. S. 426, 93 L. Ed. 1451 26
United States v. Munsingwear, 340 U. S. 36, 95 L. Ed. 36 .....4, 10
Walling v. Miller, 138 F. (2d) 629 17
Williams v. Fanning, 332 U. S. 490, 92 L. Ed. 95 30
Youngstown, etc. v. Sawyer, 343 U. S. 579, 96 L. Ed. 1153 ..... 28, 30

Statutes.

Code of Federal Regulations, Title 24, Cum. Supp. (1944) Sec. 8.3(b)(c) 29
United States Code, Title 12, Sec. 1426(i)..... 28
United States Code, Title 12, Sec. 1427 3
United States Code, Title 12, Sec. 1437 28
United States Code, Title 12, Sec. 1446 29
United States Code, Title 18, Sec. 1001 3
United States Code, Title 18, Sec. 1007 3
United States Code, Title 28, Sec. 1332 13
United States Code, Title 28, Sec. 1335 13
United States Code, Title 28, Sec. 2361 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 11767

Nos. 591, 592, 593, 594, 595, 596, and 658.

MALLONEE, BUCKLIN and FERGUS, SHAREHOLDERS' PROTECTIVE COMMITTEE, and LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, et al., *Petitioners,*

v.

FAHEY, AMMANN, as Conservator, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, et al., *Respondents.*

PETITIONERS' REPLY TO OPPOSITIONS TO CERTIORARI

WHY REPLIES NECESSARY

Petitioners feel compelled to reply to the briefs in opposition to granting of certiorari:

(a) because of inaccuracies and misstatements therein which might mislead the Court; and

(b) to call to the Court's attention the March 9th, 1953 decision of *Unexcelled Chemical Corp.* v. *U. S. A.*, October 1952 Term, No. 293, which was decided subsequent to filing on February 10, 1953 of certiorari petitions herein. (See page 6 hereof).

I. PROTECTION OF PUBLIC WELFARE REQUIRES CERTIORARI.

Petitioners and respondents however agree on one point,—the nationwide importance of the Court of Appeals' decisions of first impression, which vitally affect the entire Federal Savings System.[1]

Enforceability of $10,000,000,000.00 of Federal savings insurance, in favor of 12,000,000 depositors and borrowers, the existence of 1,500 Federal Savings and Loan Associations and Federal Home Loan Banks throughout the Nation, should not rest upon a decision of merely one Circuit.

If, the 200 pages of opinions of the Court of Appeals are erroneous, reversal is imperative to save the public welfare.

If, on the other hand, the Court of Appeals' opinions are in any part correct (which petitioners vehemently deny), then the U. S. Supreme Court itself should render its own opinions, to separate from the mass of error, such correct statements of law, if any there be.

Opposition briefs of both the Government and San Francisco Bank, by their very questions presented, demonstrate the imperative necessity of certiorari to obtain authoritative U. S. Supreme Court decision of such vital questions.

II. RESPONDENTS' FRAUDS MUST BE TRIED.

Both the original and amended pleadings unqualifiedly charge personal corruption transcending criminal liability, i.e., the adoption by respondents of their "rule or ruin"

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[1] The Petition for certiorari in No. 591, pages 24 to 30, are not only undenied, but pages 5 to 10 of the Government's brief in opposition demonstrate the grave consequences to the public welfare and the deposited savings and mortgaged homes of the millions of citizens affected by banks, savings institutions, or Government loans on their homes and insurance of their savings deposits.

policy, and the deliberate wrecking of any financial institution daring to oppose (Apl. No. 12511, R. 3184-3339).

Summarized the allegations of fraud[2] are:

(a) Fraudulent and malicious instantaneous liquidation and dissolution of the solvent $46,000,000.00 Federal Home Loan Bank of Los Angeles, solely because said Bank refused to elect as its president respondent Fahey's palace favorite.[3] (Apl. No. 12511, R. 341-578).

(b) Fraudulent and malicious seizure, without any justification, of the solvent $26,000,000.00 Long Beach Federal Savings Association, with the intent to merge and destroy it. Seizure, intended merger, and destruction, of the Savings Association was solely because its president, T. A. Gregory, resisted confiscation of the Los Angeles Bank and had sought Congressional Investigation of respondent Fahey, (Apl. No. 12511, R. 305-340). Such seizures were also to terrify and intimidate all Savings Associations, members of the seized Los Angeles Bank, and to prevent the court actions they were about to commence against respondent Fahey to recover their seized Bank and its $46,000,000.00 of assets, (Apl. No. 12511, R. 343).

In 1947, after the remand from the U. S. Supreme Court, the District Court, after hearing and upon evidence, made its finding, (Apl. No. 12511, R. 2355-2358):

> ". . . That . . . defendants . . . Fahey and . . . Ammann intended to merge or consolidate the Long Beach

[2] False and fraudulent statements, writings, or documents, made or used, ". . . Within the Jurisdiction of any Department or Agency of the United States . . ." are felonies (Title 18 U.S.C. 1001); as is the affixing of the Seal of such Department or Agency to such fraudulent matter (Title 18 U.S.C. 1007).

[3] The president of a Federal Home Loan Bank holds life and death power over all member Savings Associations by denying them credit in times of emergency. Congress provided such officers should be elected by the Bank directors. Federal Home Loan Bank Act, Title 12 U. S. C., Section 1427.

> Federal Savings . . . Association with other financial institutions and did intend thereby to destroy its identity and goodwill and to comingle and disperse its asssets and memberships by comingling them with the assets and memberships of other financial institutions, and thus render moot the questions presented in this litigation, and . . .
>
> ". . . would thereby have caused an immediate and irreparable loss and damage to the plaintiffs and other shareholder members of the Long Beach . . . Association, . . ."

Respondents, in 1947, appealed this judgment to the Court of Appeals for the Ninth Circuit, (Appeal No. 11751). The appeal was dismissed in 1948.[4]

(c) Refusal to return or account for $26,000,000.00 of depositors' seized savings.

The District Court rejected respondents' first accounting as insufficient, (Apl. No. 12511, R. 8987-8996). Respondents refused to account for, or justify, payments (and charges) of over $160,000.00 by respondents to themselves, for "conservator's expense". Petitioners also demand surcharge for $5,000,000.00 of illegal loans, made upon security falsely represented by conservator to be first liens, but actually second or junior liens. The objections charge F. H. A. and V. A. insurance of said loans is void because of falsifications by the removed conservator in applying for insurance upon such loans. Refusal to account for trustee funds paid by respondents to themselves and making loans on fraudulent security, are of course breaches of trust, as well as criminal offenses.

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[4] See *United States* v. *Munsingwear*, 340 U. S. 36, 95 L. Ed. 36—(1950), wherein this Court said at page 38 of the U. S.:

> ". . . the United States . . . acquiesced in the dismissal. It did not avail itself of the remedy it had to preserve its rights.
>
> ". . .
>
> ". . . The case ilustrates not the hardship of *res judicata* but the need for it in providing terminal points for litigation."

Respondents' answer to these allegations, (page 36 of Government's opposition in No. 591), is:

> "... it is 'better to leave unredressed the wrongs done by dishonest officers ...' ... The same considerations apply to petitioners' demand for an accounting ..."

$160,000.00 paid (or charged) from the depositors' seized savings to respondents themselves, for which they refuse to account in any way, and $5,000,000.00 of falsified loans, are referred to (page 42 of Government's opposition in No. 591), as:

> "... The synthetic allegations of fraud ..."

In *American Bank* v. *Federal Reserve Bank of Atlanta*, 256 U. S. 350, 65 L. Ed. 983 (1921), the U. S. Supreme Court said at page 358 of the U. S.:

> "... If without a word of falsehood, but acting from what we have called disinterested malevolence, a man by persuasion should organize and carry into effect a run upon a bank, and ruin it, we cannot doubt that an action would lie ..."

Six years ago, in this same litigation, in *Fahey, et al.* v. *Mallonee, et al.*, 332 U. S. 245, (91 L. Ed. 2030), at pages 256-257, this same U. S. Supreme Court said:

> "Nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies."

and remanded to the District Court for trial, (Apl. No. 12511, R. 2302-2304).

In the interval of six years, respondents have twice refused to account for petitioners' seized savings, and have prevented the trial of their own frauds, by 21 writs, appeals, and actions (detailed on pages 49-51 of petitioners' combined appendix Nos. 591-596). Because respondents,

with their unlimited resources,[5] have caused 11,000 pages of printed record, and have thereby delayed and prevented trial for six years, respondents' urge the case must be now dismissed without respondents' fraud and corruption ever being tried.

III. CONFLICT BETWEEN MARCH 1953 U. S. SUPREME COURT OPINION AND COURT OF APPEALS.

In *Unexcelled Chemical Corp.* v. *U. S. A.*, October 1952 Term, No. 293, decided March 9, 1953, (97 Adv. L. Ed. No. 9, page 486), in an unanimous opinion, this Court said:

> "... A cause of action is created when there is a breach of duty owed the plaintiff . . . The fact that due deference to the administrative process should make a court hold its hand until the administrative proceedings before the Secretary of Labor have been completed (Far East Conference v. United States, 342 US 570, 96 L ed 576, 72 S Ct 492; Thompson v. Texas Mexican R. Co., 328 US 134, 90 L ed 1132, 66 S Ct 937; General American Tank Corp. v. El Dorado Terminal Co., 308 US 423, 84 L ed 365, 60 S Ct 325; United States v. Morgan, 307 US 183, 83 L ed 1211, 59 S Ct 795) is a matter of judicial administration and of no relevancy here. The statutory liability accrued when the minors were employed. It was from that date that the period of limitations began to run."

The Court of Appeals' opinions (certiorari review of which is herein sought), are in direct and unalterable conflict with such U. S. Supreme Court holding. On page 381 of 196 F. (2d), the Court of Appeals says:

> "The doctrine of exhaustion of administrative remedies requires not merely the initiation of prescribed administrative procedures; it requires pur-

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[5] Over 50 different attorneys, including Assistant Attorneys General, U. S. Attorneys, and special counsel, have appeared for respondents in the 21 appeals, etc. Petitioner Federal Savings Association has had but *one* counsel throughout the seven years of litigation.

> suing them to their appropriate conclusion and awaiting their final outcome before seeking judicial intervention. . . ."

If certiorari be denied, and the class actions of the 16,000 depositors and 8,000 homeowners, commenced in 1946, be now, 7 years later, dismissed without trial, judicial relief from respondents frauds and personal corruption is forever denied.

California statutes of limitation are short, (from 90 days to 5 years). All have long since expired.

Respondent Federal Savings and Loan Insurance Corporation has already pled the statute of limitations to these actions,[6] notwithstanding they were filed in 1946, 7 days after the seizure of the Association.

Government respondents, on page 45 of their opposition brief in No. 591, state:

> ". . . a dismissal of this case with its unmanageable record obviously is the practical solution."

By denying and refusing demanded administrative hearings,[7] until after the expiration of the statutes of limitations, and then in 1949 without any request, on their own initiative,[8] calling the administrative hearings they refused and denied in the prior years, respondents have created for themselves the defense of the statutes of limitations to any new actions which could hereafter be filed by the 16,000 depositors or 8,000 homeowners. Yet respondents would persuade this Court to now dismiss for "failure to exhaust administrative remedies", — administrative remedies refused and denied by respondents until after expiration of the statutes of limitations.

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[6] Petitioners' combined appendix in Nos. 591-596, at pages 24-25.

[7] Petitioners' combined appendix in Nos. 591-596, at pages 19-21.

[8] Petitioners' combined appendix in Nos. 591-596, at pages 35-39.

IV. 8,000 HOMEOWNERS YET THREATENED WITH FORECLOSURE.

All respondents, now 7 years later, deny that any homeowners' titles were ever clouded, but in 1946-1948, on more than 50 separate occasions, distressed homeowners, unable to finance or convey their homes, intervened in the District Court and sought relief. On more than 50 separate occasions the District Court found:

> "... that grave and irreparable damage will be suffered by the Petitioners [homeowner borrowers] through being unable to clear the title to their said real property ..."[9]

On more than 50 separate occasions the District Court compelled respondents to deliver to the Clerk of the District Court, seized notes and deeds of trust. On each of these 50 occasions such orders were made for the express purpose of relieving the distressed homeowners from the clouds on their titles, which the District Court found to exist. On each of the 50 separate occasions respondents complied with the order of the District Court and surrendered and delivered to the Clerk of that Court seized notes, deeds of trust, and money, all for the purpose of clearing the homeowners' clouded titles.

Over $20,000,000.00 in such notes, Government bonds, and deeds of trust, were so surrendered and delivered by respondents to the Clerk of the District Court. Yet, respondents (at page 25 of San Francisco Bank's opposition to certiorari) assert:

> "... The claim of 'cloud on title' is and always has been a spurious issue in this litigation."

Counsel for a Government Agency ask the Supreme Court to believe that they surrendered over $20,000,000.00 to the Clerk of the District Court on a "spurious issue", and

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[9] Petitioners' combined appendix in Nos. 591-596, at pages 42-43.

that the Court to which they made such surrender was then, and now is, wholly without jurisdiction.

California lending practice differs from most Eastern States which use the mortgage form of security for loans. California uses the *deed* of trust, by which deed the borrower conveys title to his home to a trustee. The trustee holds such title either to reconvey to the borrower by reconveyance deed, if the loan is paid off, or to convey to the lender by trustees deed, if the borrower defaults.

By seizure of petitioner Association, respondent Ammann obtained possession of thousands of such deeds of trust and the thousands of notes secured thereby, (aggregating approximately $12,000,000.00). Ammann immediately assigned said deeds of trust, and endorsed said notes:[10]

"Pay to the Order of the Federal Home Loan Bank of San Francisco

Long Beach Federal Savings and Loan Association

By A. V. Ammann
Conservator"

and physically delivered possession of the assigned notes[11] and deeds of trust to respondent San Francisco Bank.

Respondent Ammann's assignments purportedly conveyed to respondent San Francisco Bank title to the thousands of notes and deeds of trust, and thereby clouded the title to the thousands of borrowers' homes.

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[10] All such endorsements by respondent conservator were undated, perhaps because of a restraining order of the District Court prohibiting transfer of petitioners' seized savings. (Apl. No. 12511, (R. 33).

[11] Petitioners' combined appendix in Nos. 591-596, Plate 5, pages 40-41.

Respondent San Francisco Bank has never re-assigned, reconveyed, or otherwise released the title it acquired by such assignments.[12]

The 1946-1948 final judgments of the U. S. District Court cancelling said assignments and re-vesting title in petitioner Association are the vital links in the homeowners' chain of title.

If the District Court "... never had ... jurisdiction over the subject matter ..." as the San Francisco Bank alleges in its 1952 foreclosure, (and as the Court of Appeals holds), these vital links are broken and the homeowners' chain of title falls with the jurisdiction of the District Court.

But the time for appeal from these final quiet title judgments expired 5 (or more) years ago. Appeals taken in 1947 by respondents from some of such orders were dismissed in 1948.[13] No appeals were ever taken from any others.

In 1952, the Court of Appeals is without authority to vacate these 5 year final quiet title judgments, from which no appeal was ever taken, or from which appeals were taken in 1947 and dismissed in 1948.

Nor, can the subterfuge of dismissing the complaints, cross-claims, etc., upon which these final judgments rest, accomplish indirectly what the Court of Appeals is without power to do directly.

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[12] Except as to about 200 returned to Ammann during the conservatorship.

[13] See *United States* v. *Munsingwear*, 340 U. S. 36, 95 L. Ed. 36—(1950), wherein this Court said at page 38 of the U. S.:

> "... the United States ... acquiesced in the dismissal. It did not avail itself of the remedy it had to preserve its rights.
> "...
> "... The case illustrates not the hardship of *res judicata* but the need for it in providing terminal points for litigation."

The March 1952 order[14] of the Court of Appeals permitting respondent San Francisco Bank to "foreclose", is but another device by respondents to evade the 5 year final quiet title judgments of the District Court.

Respondent San Francisco Bank's only right to foreclose the homeowners is based upon the assignments from conservator Ammann, assignments cancelled five years ago by final judgments of the District Court. Nevertheless respondent San Francisco Bank now seeks such foreclosure of $7,000,000.00. Its complaint reads in part, on page 7, lines 11 to 21:

> "That said defendant [Long Beach Federal] assigned, delivered and pledged to plaintiff . . . promissory notes secured by mortgages or deeds of trust on real property . . . as security for the repayment of said sums advanced and loaned to said defendant by said plaintiff . . . That by reason of said assignments and pledges said *Plaintiff* became, ever since has been and *still is* the owner and holder of *a lien* upon all said pledged and assigned property." (Emphasis added).

The complaint prays judgment, at page 2, line 11:

> "For judgment foreclosing its aforesaid lien in the manner as provided by law;"

Such foreclosure suit names as defendant, petitioner Long Beach Federal Savings and Loan Association, the record owner of the several thousand notes and deeds of trust on the borrowers' homes, foreclosure of which is thus prayed for.

In March of 1948, the District Court, as part of the mass interpleader to clear the titles to the borrowers' homes,

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[14] Made by the Court of Appeals without notice to the homeowners who had paid their loans in full to the District Court, but yet are to be foreclosed, and vacating interpleader injunctions from which no appeals were ever taken, without notice to the parties who obtained such interpleader injunctions.

made its final judgment, which read in part, (see petitioners' combined appendix in Nos. 591-596, at page 46):

> ". . . any and all endorsements appearing on . . . the notes and trust deeds . . . in favor of said Federal Home Loan Bank of San Francisco . . . are hereby cancelled, and the title thereto . . . is hereby revested in said Long Beach Federal Savings and Loan Association."

In its $7,000,000.00 foreclosure complaint, respondent San Francisco Bank alleges, (on page 9, paragraph XIV, lines 3 to 7 thereof, in part as follows:

> ". . . the aforesaid U. S. District Court never had and does not now have jurisdiction over the subject matter of said action, . . ."

The holding of the Court of Appeals that the District Court is without jurisdiction nullifies all of the foregoing quiet title judgments in favor of the homeowners, and exposes them to loss, both of the money they have paid, (or caused to be paid), into the District Court, and the titles to their homes, cleared and quieted by such payments.

The disclaimer by counsel of any intent to foreclose on the homeowners, appears nowhere in the record in the Court of Appeals, nor in the $7,000,000.00 foreclosure action in the U. S. District Court. It occurs for the first time in respondents' opposition to certiorari in the U. S. Supreme Court.

Its reliability may be judged by the written stipulations of respondents' counsel. The written stipulation of the Assistant Attorney General of the United States, filed with the U. S. District Court in 1949, and relied upon by that Court and all counsel, (Apl. No. 12591, R. 297-299), has been held by the Court of Appeals in Appeal No. 12591, at page 67 of the slip opinion, to be utterly worthless.[15]

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[15] In *Swift* v. *U. S.*, 276 U. S. 311, (73 L. Ed. 587) (1927), on page 331, this Court held that agreements filed with the District Court by the Attorney General were binding upon the United States.

The 1948, five year final quiet title judgments of the District Court in favor of the homeowners and against respondents, have been held by the same Court of Appeals to be equally worthless. (Page 99 of the slip opinion in Appeal No. 12591).

Eight thousand homeowners have paid off the loans on their homes in full into the registry of the U. S. District Court in reliance on the 1947 mandate of this Honorable U. S. Supreme Court for "further proceedings". They now ask what, if any, protection remains for their homes if both the written word of the Assistant Attorney General of the United States, filed with the District Court, and five year final quiet title judgments of the U. S. Courts, are both merely "scraps of paper".

V. CALIFORNIA HOMEOWNERS' TITLES CAN BE CLEARED ONLY BY U. S. DISTRICT COURTS IN CALIFORNIA.

Respondents seized, assigned and conveyed, $26,000,000.00,—the savings of 16,000 depositors, and titles to the homes of 8,000 borrowers, all in California.

Only the U. S. Courts in California which have physical jurisdiction of the seized savings deposits and the thousands of homes (real property) can protect the depositors and homeowners. Federal interpleader jurisdiction is nationwide. The district of a U. S. Court in interpleader is the boundaries of the United States. It includes the District of Columbia.[16]

Treinies v. *Sunshine Mining Co.*, 308 U. S. 66, 84 L. Ed. 85—(1940), at page 70 of the U. S.:

> ". . . Process may run at least throughout all the states."

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[16] Title 28 U. S. C., Sec. 1332. "*Diversity of citizenship:* . . . (b) The word 'States', . . . includes . . . the District of Columbia." Sec. 1335. "*Interpleader* . . . (1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 . . ."

Further at page 74 of the U. S.:

> ". . . Such authority is essential to the protection of the interpleader jurisdiction and is a valid exercise of the judicial power . . ."

See also *Title 28 U. S. C., Sec. 2361.*

Respondents' insistence that only the District of Columbia courts have personal jurisdiction, denies all court relief to 12,000,000 Federal Savings depositors and homeowners of the 48 states.

Respondent San Francisco Bank today, foreclosing $7,000,000.00 of denied liability against the homes of 8,000 California borrowers, could not be summoned to the District of Columbia to prevent such foreclosure, nor could any decree of a District of Columbia court reach, nor affect, the seized and assigned savings and homes (real property) in California, nor in any of the 48 states.

When Congress enacted that respondent Federal Savings and Loan Insurance Corporation and Federal Home Loan Bank of San Francisco should "sue and be sued, complain and defend, in any court of law or equity, *State* or Federal,"[17] it intended suit throughout the United States. There are no *State* courts in the District of Columbia.

Seven Oaks v. *F. H. A.*, 171 F. (2d) 947 (C. C. A.—4, 1948), at page 949:

> ". . . Congress . . . could hardly have intended that persons in California, . . . desiring to exercise the right to sue must travel to the District of Columbia to do so . . ."

District of Columbia courts are completely without authority over California real estate, but U. S. Courts, within whose territory California real estate is situated, can exercise the nationwide interpleader jurisdiction expressly conferred by Acts of Congress, and protect the

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[17] Petitioners' combined appendix in Nos. 591-596, at page 13.

seized titles to the homes of the thousands of borrowers against confiscation by actions of respondents, citizens of the District of Columbia.

VI. THE CALIFORNIA DISTRICT COURT HAS PERSONAL JURISDICTION OVER GOVERNMENT RESPONDENTS.

A. In Interpleader.

Throughout respondents' oppositions, they repeatedly assert that the U. S. District Court has no personal jurisdiction over them.

But, in their 1947 brief to the U. S. Supreme Court in this same case (October 1946 Term, Nos. 687 and 133 Misc.), they admit that nationwide interpleader process of the U. S. Court in California was personally served on respondent Fahey, who was then the one-man Home Loan Bank Board.

They said at page 11:

> "Service of process upon Fahey under both cross-claims in interpleader was made in the District of Columbia . . ."

They now seek in their oppositions to confuse who are the conflicting claimants and deny diversity of citizenship between such claimants. All such matters are clearly set forth with references to original and amended pleadings in our petitions.[18]

B. Government Respondents Have Made General Appearances In The District Court.

After the remand from the U. S. Supreme Court to the District Court "for further judicial proceedings", respondents Home Loan Bank Board adopted their official

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[18] See pages 9 to 11 of petition No. 596, and pages 19 to 21 of petition No. 593, for complete analysis of interpleader jurisdiction, diversity of citizenship, and refusal of Supreme Court in 1947 to dismiss these interpleader cross-claims. See also Finding of District Court re claims of respondents, Apl. No. 12511, R. 8282.

resolution No. 388 (Apl. No. 12511, R. 8231). The District Court found (Apl. No. 12511, R. 8283):

> "77. That said Resolution No. 388, in part, provided as follows:
>
> > " 'Be It Further Resolved that a certified copy of this resolution be forthwith delivered to the above-named Court and to counsel for each of the parties of record in actions numbered 5254 P.H. and 5678 (WM) P.H. in said Court. . .'
>
> "That a certified copy of said resolution was duly and regularly filed in the within case, in the above-entitled Court, and that on January 23, 1948, after hearing, this Court made its order and judgment for restitution of said Association (Exhibit 'A' attached hereto), which Order was based among other things upon the said resolution or Order No. 388, . . .
>
> "That as a matter of law and fact, the filing of said Order No. 388, constitutes a general appearance by said Board, in the within action, and the submission by said Board to the jurisdiction of this Court . . . That adjudications upon said Order No. 388 as herein otherwise set forth, have not been completely, or finally, made in that the rights and liabilities of the various parties, during the said period of conservatorship, have not yet been determined, nor has the accounting of said Ammann as conservator been approved.
>
> "78. That time for appeal from said Order and Judgment of this Court, dated January 23, 1948, has long since expired without any appeal therefrom having been taken. That said defendants have made no efforts or taken any proceedings to vacate or set aside said judgment before this or any other court."

At the hearing upon such general appearance of respondents, they sought from the District Court:

(a) The appointment of a Special Master. The District Court appointed their own attorney, Ronald Walker, as Special Master, to conduct a special election

of directors of petitioner Association by its 16,000 shareholders.[19] (Apl. No. 12511, R. 10314-10326).

(b) A $1,000,000.00 surety bond, furnished by the officers of petitioner Association, indemnifying against the very misconduct respondents complain of in their oppositions to certiorari. Such $1,000,000.00 surety bond has been on file with the District Court for 5 years. Neither respondents, nor any one, has made any effort to enforce any claims against such bond. (Apl. No. 12511, R. 10333).

(c) A court order approving every act of the conservator as valid and binding upon petitioner Association, regardless of its untried objections thereto. The court refused to make such order.

Respondents' attorneys unqualifiedly signed:

> "The undersigned hereby consent to and approve the foregoing order."

at the end of the order appointing their own attorney as the Court's Special Master. The following page hereof is a photostatic copy of the signature page of such order.

By such removal of conservator and general appearance before the District Court by respondents' own Order No. 388, the issues of administrative hearing and "exhaustion of administrative remedies" became moot forever.

By such consent they waived forever all questions of personal jurisdiction of the U. S. District Court, in both the Mallonee action and the Los Angeles Bank action.

Swift v. *U. S.*, 276 U. S. 311, 73 L. Ed. 587, (1927).

Walling v. *Miller*, 138 F. (2d) 629—(C.C.A.-8—1943).

Respondents' Order No. 388 expressly referred to both actions by number. The actions had been "consolidated

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[19] Such election resulted in unanimous re-election of the founding management without a single dissenting vote—the management respondents accused of misconduct.

The undersigned hereby consent to and approve the foregoing Order.

Westover and Smith
by Wyckoff Westover - attorneys for the Plaintiffs - Petitioners

Charles H. Chapman atty for T. B. Fed. Savings & Loan Ass'n

Thos. H. Kuchel By H. Mauser,
Attorney for Agricultural Adjustment
Farm Loans Corp.

James Mc Carter
U.S. Attorney

William F. McKenna
Chief Trial Counsel Home Owners Loan Corp.

O. Melvoin & Myers by
John Wright
Atty for Def. party defendant
and Respondent Individual
Home Loan Bank of Los Angeles

Raymond Cremaring
atty for Claimant
Robert A. Wallis

for all purposes" (Apl. No. 12511, R. 2788), by the District Court. The judgment and order to which respondents signed ". . . consent . . . and approve . . ." was made in the consolidated cases.

VII. RESPONDENTS REFUSE ADMINISTRATIVE HEARINGS YET DEMAND DISMISSAL FOR "FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES".

On page 20, in footnote 48, of Government respondents' opposition in No. 591, they admit that they refused and denied the demand of "minority" Long Beach shareholders for administrative hearings, and that such refusal was because the matters were pending in the U. S. District Court in California.[20]

Yet, in their opposition to the homeowners' petition for certiorari, No. 593, on page 3, footnote 2, Government respondents state:

> "Petitioner, [homeowners] as an interested party, could have asked for leave to intervene in the administrative proceeding."

The same claim is repeated as to other interpleaders on page 3, footnote 1 of respondents' opposition in No. 595, and elsewhere throughout their oppositions.

Respondents admit that they refused and denied administrative hearings to the shareholders because their own regulations authorized administrative hearings only:

> ". . . at the request of the association's directors . . ."

Yet, in 1949, after the expiration of the statutes of limitations, respondents, at no ones' request, set their own administrative hearing to appoint themselves receiver of the Association in order to obtain control of the depositors' litigation against respondents.

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[20] Petitioners' combined appendix in Nos. 591-596, at pages 20-21.

Access to the courts of the United States cannot be prevented by denial of administrative hearings until after all statutes of limitation have expired, and all actions are forever barred.

VIII. ACTION FOR RETURN OF SEIZED SAVINGS AND ACCOUNTING IS NOT A COLLATERAL ATTACK ON CONSERVATOR'S APPOINTMENT.

Throughout respondents' briefs in opposition, they misstate petitioners' objectives. Regardless of the validity of respondent conservator's appointment, petitioners are entitled to the return of *all* of their savings, and an accounting for what was seized.

Respondents' position is that they can seize any Federal Home Loan Bank or Federal Savings Association, with complete immunity, — immunity from receipting for $26,000,000.00 in uncounted cash, bearer bonds, and negotiable securities, —immunity from returning any part of the seized uncounted cash and bonds,—and immunity from ever accounting for how much was seized or for what was done with the depositors' seized savings.

To paraphrase respondents' opposition to No. 591, on page 36:

> "... it is 'better to leave unredressed the wrongs done by dishonest officers than to subject ...' " them to the "... constant dread ..."

of accounting for the seized $26,000,000.00 in uncounted cash, bearer bonds, and negotiable securities.

IX. ANSWER TO CHARGES AGAINST MANAGEMENT.

Respondents claim their seizure of Long Beach was justified by appropriation of $100,000.00 for defense of Long Beach against respondents' seizure and confiscation, and by other charges of misappropriations.

The appropriation for attorneys' fees was deposited in interpleader in the U. S. Courts seven years ago, (within

a few days after the appropriation was made) (Apl. No. 12511, R. 8267).

No attorneys' fees have ever been either appropriated or paid from Association funds for defense of "management".

Petitioners' attorneys fees have been paid *only* by order of the District Court, and *only* for defense of the Savings Association against respondents confiscations.

Respondents, in *Ex Parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041, sought prohibition against the District Judge to prevent payment of any attorneys fees,—even to the Shareholders' Protective Committee.

In 1947 the Supreme Court denied the writ.

After denial of prohibition by the Supreme Court, respondents, in Appeal No. 11751, to the Court of Appeals, sought stay of payment of attorneys fees. After printed briefs and full argument, the Court of Appeal denied stay. This appeal was dismissed in 1948.

Both respondent Fahey (former Bank Commissioner) and Divers (Chairman of respondent Home Loan Bank Board), made their affidavits (Apl. No. 12591, R. 52-54) that:

> "That the Home Loan Bank Board has never taken or proposed to take any disciplinary action of any kind against any savings and loan association . . . on account of its use of funds to contest the . . . appointing a conservator for the Long Beach Federal Savings and Loan Association or its use of funds for litigation in connection therewith, . . ."

Long Beach's management at all times was, and yet is, under surety bond. A $200,000.00 surety bond has at all times been in the possession of respondents. A $1,000,000.00 surety bond was filed by Long Beach management with the District Court in 1948 (Apl. No. 12511, R. 3553-3556-A, 8233). The express terms of such bonds cover the very allegations made by respondents. Yet, in seven years, no action to collect on either surety bond has ever been taken by respondents or any one (Apl. No. 12511, R. 8233).

Respondents also complain of creation by Long Beach management of $21,000.00 of voting accounts in a $26,000,000.00 Association.

At respondents' express request, the District Court in 1948 appointed as its Special Master, respondents' own former attorney, Ronald Walker, who conducted under the Court's supervision, a special election of the 16,000 depositors. Long Beach's founding management was unanimously re-elected without a single dissenting vote.

The Special Master's report to the Court was accepted by the Court without objection by respondents or any one (Apl. No. 12511, R. 6120).

The $21,000.00 of voting accounts have never been voted at any time.

In 1948 respondents returned the remnants of the seized Savings Association to the identical management from which it had been seized. They then refused demanded administrative hearings on such charges. In 1949 they revived these same charges as a pretext for a second seizure, to appoint themselves receiver and liquidate the Association, the litigation, and the necessity for accounting, (Apl. No. 12511, R. 8263-8267). Respondents own counsel, an Assistant Attorney General, admitted under oath that the charges were for "horse trading".[21]

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[21] Hearings before a Special Subcommittee of the Committee on Expenditures in the Executive Departments, House of Representatives, Eighty-first Congress, Second Session, and Eighty-second Congress, First and Second Sessions, Investigation of the Home Loan Bank Board, at pages 1540-1541 of the transcript of such hearings:

> Q. "Very frankly, Mr. MacGuineas, was the Board prepared to wipe out these charges if a settlement could have been reached?"
>
> "MR. MACGUINEAS . . . Any settlement is going to result in a net compromise . . ."
>
> Q. "It is a question of horse trading?"
>
> "MR. MACGUINEAS. Of course. Why, any settlement of a complicated case must necessarily be that. So my thought was we would try to trade . . ."

Respondent Adams, member of respondent Home Loan Bank Board, stated under oath, the seizures:

"... were arbitrary and capricious and vindictive, ..."

X. SUPERVISION MUST NOT MEAN DESTRUCTION.

Respondents complain that they have been prevented from supervision of petitioner Association, yet they admit that in 1946 they seized $26,000,000.00 of deposited savings of 16,000 depositors, (Apl. No. 12511, R. 8215), caused a $10,000,000.00 run, (Apl. No. 12511, R. 8249), purported to borrow $7,300,000.00 on the security of the seized savings deposits, and in January of 1948 returned the remnants of the seized Federal Savings Association to the very management from which they had seized it.

Respondents' attempted accounting for the seized savings has been rejected by the District Court, (Apl. No. 12511, R. 8987-8996), yet respondents demand, on penalty of liquidation of the Savings Association, that petitioners verify under oath, (in the form of monthly and annual reports) all of the bookkeeping entries made by seizing respondents, who for nearly two years were in possession of the Savings Association, (Apl. No. 12511, R. 8277). Such verification by Association would admit liability for the $7,000,000.00 denied debt. Petitioners did not sign the notes, nor receive the loaned money. The debt was created by respondents in violation of applicable statutes, regulations, and a court restraining order, (Apl. No. 12511, R. 33). The District Court has found, (Apl. No. 12511, R. 8278), such verification:

> "... would ... require said Association to prejudice, waive, or abandon the litigation of the Association's shareholders in the class action herein brought on behalf of said shareholders, without the consent, agreement, or knowledge of said shareholders, ..."

Supervision, as practiced by respondents against petitioner Savings Association, means liquidation, (Apl. No.

12511, R. 8253), and destruction, prevented only by the injunction of the District Court, pending trial of the fraudulent seizures (Apl. No. 12511, R. 8217) by respondents and their accounting for the depositors' seized savings.

XI. FEDERAL SAVINGS DEPOSIT INSURANCE NULLIFIED.

Petitioners have sued in the U. S. District Court in California for enforcement of, and declaratory relief concerning, the $22,000,000.00 of Federal insurance of their seized savings, insured by respondent Federal Savings and Loan Insurance Corporation.

The Court of Appeals has ordered dismissal without trial.

On pages 45-46 of Government respondents' opposition to certiorari in No. 591, the Insurance Corporation states:

> "... any claims on this score are premature."

but in their answer, filed in the District Court,[22] respondent Insurance Corporation pled:

> "... this action against this defendant is barred by the statutes of limitations. ..."

Denial of certiorari and dismissal of the 16,000 depositors' class action to enforce Federal Insurance of their $22,000,000.00 of seized savings deposits would forever bar institution of another action now, seven years after the seizure.

XII. JURISDICTION OF U. S. DISTRICT COURT IS RES JUDICATA.

Our point that jurisidiction of the District Court is res judicata[23] is answered by Government respondents only in

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[22] Petitioners' combined appendix in Nos. 591-596, at pages 24-25.

[23] Petition No. 591, page 43; petition No. 593, page 34; and petition No. 596, page 27.

their opposition to No. 591, where, on page 44, footnote No. 82, they state:

> ". . . the judgments upon which petitioners rely are merely interlocutory decisions . . . This issue was thoroughly briefed in the court below."

But in the Court below, respondents conceded that the judgments are final. On page 34-35 of respondents' combined brief to the Court of Appeals, in Appeal No. 12511, they state in part:

> ". . . the Conservator was removed by the court below (R. 8310). The order of January 23, 1948, insofar as it terminated the conservatorship, was final, and, no appeal having been filed within the time allowed, the propriety thereof is no longer open for consideration."

XIII. PETITIONERS HAVE STANDING TO SUE AND A JUSTICIABLE INTEREST TO PROTECT.

By seeking dismissal without trial, respondents admit all the allegations of petitioners' pleadings. Such allegations as to Los Angeles Bank, summarized, are:

Respondents seized without notice or hearing, summarily liquidated, instantaneously dissolved and merged, the $46,000,000.00 Federal Home Loan Bank of Los Angeles, of which petitioners are stockholders and members (Apl. No. 12511, R. 9465-9501).

Petitioners' stock in said seized Bank represented ownership in the assets of the Bank of a value of $132.00 per share (Apl. No. 12511, R. 9498). By such seizure and merger, petitioners were deprived of $32.00 per share, and can now receive only $100.00 per share. The total of such stock is over $6,000,000.00, and the amount thus lost by the class of stockholders represented by petitioners approximates $2,000,000.00 (Apl. No. 12511, R. 9498).

In addition to stockownership, petitioner Long Beach Association had on deposit with the Los Angeles Bank, for safekeeping only, $8,500,000.00 of U. S. Government bonds,

owned by Long Beach alone (Apl. No. 12511, R. 8402). Such bonds were seized by respondents as part of the Los Angeles Bank seizure, and have never been returned to said Association.[24]

Said seizures, dissolution and merger, were beyond any statutory or other authority of respondents. They were without due or any process of law, are unconstitutional, and represent only the individual will of respondents.

Such acts are wholly void. The seizures and instantaneous liquidation were made fraudulently, maliciously, and without any basis in fact or law. They were against the will, and without the consent, of any of the stockholders and members of both the Los Angeles and Portland Banks (Apl. No. 12511, R. 286-302, 9465-9501).

Respondent Adams, member of respondent Home Loan Bank Board, admits under oath[25] that the seizures and instantaneous liquidation without notice or hearing, were:

> "... arbitrary and capricious and vindictive, ..."

In *United States* v. *I. C. C.*, 337 U. S. 426, 93 L. Ed. 1451, (1949), this Court said at page 431 of the U. S.:

> "... But the Government charged that the order was issued arbitrarily and without substantial evidence. This charge alone would be enough to present a justiciable controversy ..."

In *Land* v. *Dollar*, 330 U. S. 731, 91 L. Ed. 1209, (1947), this Court said at page 738 of the U. S.:

> "... public officials may become tortfeasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, re-

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[24] Yet respondents contend confiscation of $8,500,000.00 of privately owned bonds does not present a justiciable issue, and that petitioners can never question what became of this seized property or seek its return.

[25] See Petition No. 591, page 9, footnote No. 2.

> coverable by appropriate action at law or in equity, . . . The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld."

In *Board of Governors of the Federal Reserve System* v. *Agnew*, 329 U. S. 441, 91 L. Ed. 408, (1947), this Court said at page 444 of the U. S.:

> ". . . the determination of the extent of the authority granted the Board . . . is subject to judicial review . . . the District Court is authorized to enjoin . . . if the Board transcends its bounds and acts beyond the limits of its statutory grant of authority (citing authorities) . . ."

In the above case, a single director was unlawfully removed. In our present case, the entire Home Loan Bank for the West Coast was abolished and its entire assets were confiscated.

In *Stark* v. *Wickard*, 321 U. S. 288, 88 L. Ed. 733, (1943), this Court said at page 305 of the U. S.:

> ". . . on the allegations of the complaint these producers have such a personal claim as justifies judicial consideration . . ."

At page 310 of the U. S. this Court further said:

> ". . . Congress established courts to adjudicate . . . claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power."

In *Joint Anti-Fascist* v. *McGrath*, 341 U. S. 123, 95 L. Ed. 817, (1951), this Court said at page 136 of the U. S.:

> ". . . Where an act of an official plainly falls outside of the scope of his authority, he does not make that act legal by doing it and then invoking the doctrine of administrative construction to cover it."

In *Youngstown, Etc.* v. *Sawyer,* 343 U. S. 579, 96 L. Ed. 1153, (1952), this Court said at page 655 of the U. S.:

> ". . . The executive action we have here originates in the individual will of the President and represents an exercise of authority without law . . ."

In the Los Angeles Bank seizure and instantaneous liquidation, respondents make no pretense of any wrongdoing or misconduct on the part of the Bank or its management. The only justification is ". . . the efficient and economical accomplishment of the purposes of the Federal Home Loan Bank Act, . . ."[26] The falsity of this pretext is self evident. "Efficiency and economy" are not accomplished by instantaneously merging a $46,000,000.00 solvent and growing reserve bank into a $9,000,000.00 bank unable to show any growth in its 10 years of existence, (Apl. No. 12511, R. 9154).

"Efficiency and economy" do not require instantaneous ex parte seizure and liquidation nor do they require secrecy and concealment in transporting the seizure and liquidation orders 3,000 miles to be executed summarily, (Apl. No. 12511, R. 9140), so as to prevent recourse to the courts, or Congress, by the bank to be instantaneously dissolved without notice or hearing.

Respondents claim such action is within their statutory right. Petitioners allege the contrary.

Even a casual reading of the Act demonstrates such summary ex parte confiscation and infliction of corporate death, are beyond any statutory powers of respondents.

Respondents could remove an officer or director of a bank only by stating the ". . . cause of such . . . removal . . . in writing . . ." (Title 12 U. S. C. 1437).

Respondents could remove any member of a Bank from membership only ". . . after hearing . . ." (Title 12 U. S. C. 1426(i)).

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[26] Petitioners' combined appendix in Nos. 591-596, at page 9.

Respondents could liquidate or reorganize a Bank only when the ". . . board finds . . ." (Title 12 U. S. C. 1446).

By respondents' own regulations, notice and hearing were required before the action they took in this case. (Title 24 C. F. R. Cum. Supp. (1944) Sec. 8.3 (b)(c)) (Apl. No. 12511, R. 9141).

Such were respondents powers conditionally granted by Congress, to be exercised only upon the stated conditions. Respondents actions nowhere complied with such limitations.

Respondents removed not one, but the entire board of directors and every officer of the Los Angeles Bank without ever stating ". . . the cause of such . . . removal . . . in writing . . ."

Respondents removed, not one, but 173 members from membership in the Los Angeles Bank without any ". . . hearing . . . " ever being held.

Respondents liquidated, dissolved and merged the Los Angeles Bank without ever making any "finding", giving any notice, holding any hearings or taking any evidence.

All such were contrary to the express limitations of the Acts of Congress, the only source of respondents claimed authority. Respondents actions were final. No reconsideration or other agency review is available.

Almost every cabinet officer, government agency, board or bureau, has been held subject to suit when it or they exceed statutory authority.

In *Board of Governors of the Federal Reserve System* v. *Agnew*, 329 U. S. 441, the Federal Reserve Board was held so subject to suit.

In *Land* v. *Dollar*, 330 U. S. 731, the Maritime Commission was held so subject to suit.

In *Stark* v. *Wickard*, 321 U. S. 288, the Secretary of Agriculture was held so subject to suit.

In *Joint Anti-Fascist* v. *McGrath*, 341 U. S. 123, the Attorney General of the United States was held so subject to suit.

In *Williams* v. *Fanning*, 332 U. S. 490, the Postmaster General was held so subject to suit.

In *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, the Secretary of the Interior was held so subject to suit.

In *Youngstown, Etc.* v. *Sawyer*, 343 U. S. 579, the Secretary of Commerce, exercising the express authority of the President, was nevertheless held so subject to suit.

It is fundamental that no agency can validly act beyond its authority or in violation of the Constitution. Respondents did both.

Respondents have shown no cause whatsoever why they alone of the entire Government, should be singled out and granted authority to violate both the statutes of their creation and the Constitution.

Our ". . . government of laws and not of men . . ." has ceased to exist if these seizures, based only on ". . . the individual will of . . ." respondents, and an ". . . exercise of authority without law . . ." are beyond the power of all Courts to rectify.

Respondents 169 pages of opposition to certiorari are replete with other inaccuracies and misstatements which can be properly refuted only by an equally long reply.

Such conflicts demonstrate the need for certiorari rather than support the opinions of the Court of Appeals.

CONCLUSION

The Court of Appeals' opinions that supervising authorities cannot be tried for fraud and corruption, nor compelled to account for seized savings, are blots upon the integrity of our Government.

That respondents, in their oppositions, assert such immunity and seek dismissal without trial, demonstrate that certiorari is required, lest public faith in the honesty of

our Government, already badly shaken, be completely destroyed.

Respectfully submitted,

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SUBJECT INDEX

PAGE

Point I. The argument that the dissolution of the Los Angeles Bank was a governmental act into the propriety of which the courts cannot inquire is not tenable..... 2

Point II. Members of Federal Home Loan Banks have proprietary and justiciable interests as members of such banks..... 5

Point III. The Los Angeles action is not a collateral attack on administrative action 12

Point IV. The Los Angeles action does not ask for a review of questions requiring expert knowledge..... 13

Point V. The members of the Federal Home Loan Bank Board are not indispensable parties..... 14

Point VI. The Los Angeles action is not in fact a suit against the United States Government without its consent..... 17

Conclusion 18

TABLE OF AUTHORITIES CITED

CASES

Alabama Power Company v. Ickes, 302 U. S. 462 11

American Bank v. Federal Reserve Bank of Atlanta, 256 U. S. 350, 65 L. Ed. 983 4

Board of Governors v. Agnew, 329 U. S. 441, 91 L. Ed. 408 4

Fahey v. Mallonee, 332 U. S. 257, 91 L. Ed. 2030 3

Farmers & Merchants Bank v. Federal Reserve Bank, 262 U. S. 649, 67 L. Ed. 1157 8

Federal Land Bank v. Priddy, 295 U. S. 229 ..... 5, 18

Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U. S. 95 6

Hynes v. Grimes Packing Co., 337 U. S. 86, 93 L. Ed. 1231 4

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 95 L. Ed. 817 4

Keifer v. Reconstruction Finance Corporation, 306 U. S. 381, 59 S. Ct. 516, 83 L. Ed. 784 18

Land v. Dollar, 330 U. S. 731, 91 L. Ed. 1209 4

Massachusetts v. Mellon, 262 U. S. 447 11

Peoples' Bank v. Federal Reserve Bank of San Francisco, 58 Fed. Supp. 25 10

Perkins v. Lukens Steel Company, 310 U. S. 113 11

Stark v. Wickard, 321 U. S. 288, 88 L. Ed. 733 4

Tennessee Electric Power Company v. Tennessee Valley Authority, 306 U. S. 118 11

United States v. I. C. C., 337 U. S. 426, 93 L. Ed. 1451 4

Williams v. Fanning, 332 U. S. 490, 92 L. Ed. 95 ..... 4, 15

Youngstown Sheet & Tube v. Sawyer, 343 U. S. 579, 96 L. Ed. 1153 ..... 4, 14

STATUTES

Federal Home Loan Bank Act, Sec. 3 12

Federal Home Loan Bank Act, Sec. 6(i) 8

PAGE

Federal Home Loan Bank Act, Sec. 25 12
Federal Home Loan Bank Act, Sec. 26 12
United States Code, Title 12, Sec. 1423 ..... 12, 15
United States Code, Title 12, Sec. 1426(f) 17
United States Code, Title 12, Sec. 1426(1) 8
United States Code, Title 12, Sec. 1445 12
United States Code, Title 12, Sec. 1446 ..... 8, 9, 12
United States Code Annotated, Title 12, Sec. 1426 9
United States Code Annotated, Title 12, Sec. 1426(i) 9
United States Code Annotated, Title 12, Sec. 1432 17
United States Code Annotated, Title 12, Sec. 1436 9

IN THE

Supreme Court of the United States

October Term, 1952

No. 592

WILMINGTON FEDERAL SAVINGS & LOAN ASSOCIATION, and W. I. GILBERT, JR., for themselves and on behalf of FEDERAL HOME LOAN BANK OF LOS ANGELES, and its stockholders,

Petitioners,

vs.

HOME LOAN BANK BOARD, WILLIAM K. DIVERS, O. K. LAROQUE, J. ALSTON ADAMS, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, JOHN H. FAHEY, A. V. AMMANN and GEORGE K. BRAMLEY,

Respondents and Appellants Below.

Answer to Brief for Respondents Federal Home Loan Bank of San Francisco and Respondents Fahey, Ammann, Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, Divers, Adams, La Roque, Heisler, and Bramley in Opposition.

This reply is filed on behalf of Wilmington Federal Savings & Loan Association and W. I. Gilbert, Jr., in Petition No. 592. It answers only those contentions of respondents Federal Home Loan Bank of San Francisco and respondents Fahey, *et al.,* which directly concern the issues of the Los Angeles action.

POINT I.

The Argument That the Dissolution of the Los Angeles Bank Was a Governmental Act Into the Propriety of Which the Courts Cannot Inquire Is Not Tenable.

One of the chief points presented by Wilmington's petition was whether judicial review is available to determine whether the liquidation of the Los Angeles Bank amounted to an unconstitutional use of constitutional power, and was "unlawful" and "void," "wholly punitive" and an "arbitrary abuse of discretion * * * amounting to fraud in law."

The answer of Fahey* admits (pp. 11-12) by reference to the answer of the same respondents in No. 591 (pp. 41-42) that "personal corruption or breach of trust for personal gain" would furnish a ground for the courts to review the administrative action of the Federal Home Loan Bank Board. This admission is significant. But what follows (Fahey's answer in No. 591, p. 42) is a deplorable piece of sophistication. It is stated that in the instant case the allegation that false findings were knowingly made, falls short of an allegation of personal corruption, and is only a "synthetic" charge of fraud!

The Los Angeles action goes beyond the mere allegation "synthetic" fraud to the effect that the findings were made in the knowledge that they were false. But even the government's suggestion that its agencies may commit

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*By this designation we refer throughout to the answer of respondents Fahey, *et al.*, in No. 592.

"synthetic fraud" is shocking indeed, and if administrative power is exercised these days under such a conception, then a clearer case for granting certiorari and correcting so monstrous a notion cannot be imagined. Paraphrased, Fahey's argument means that the administrative officer can be arbitrary, can be capricious, he can make findings known to be false, he can use his power to punish those who oppose him, and in all these matters the courts are powerless to grant review unless there is further evidence of breach of trust or financial gain!

The answer of the San Francisco Bank (p. 13) on this point is equally unsatisfactory. It says: since the statute in so many words entitles the Board to liquidate Federal Home Loan Banks when it finds that the efficient and economical accomplishment of the purposes of the Federal Home Loan Bank Act will be aided thereby, all the board needs to do is to repeat in its findings the magic incantation suggested by the wording of the statute. The use of the verbal formula contained in the Act, so the argument implies, casts a paralyzing spell over all further inquiries by the courts. But this is not so. That the question of "ill will and malice" on the part of the supervising authorities may be submitted to the courts has been indicated by this Honorable Court in the previous appeal of this very case.

> *Fahey v. Mallonee,* 332 U. S. 257, 91 L. Ed. 2030, 2041.

Even if there were but "disinterested malevolence," it would move this court to action, as appears from *American*

Bank v. Federal Reserve Bank of Atlanta, 256 U. S. 350, 65 L. Ed. 983, 990:

> "If without a word of falsehood, but acting from what we have called disinterested malevolence, a man by persuasion should organize and carry into effect a run upon a bank, and ruin it, we cannot doubt that an action would lie . . ."

This Honorable Court has decided in too many cases to leave room for dispute that the courts will always inquire whether the delegated administrative power has been exercised in the mode and within the bounds set by the statute. See

Land v. Dollar, 330 U. S. 731, 91 L. Ed. 1209;

Board of Governors v. Agnew, 329 U. S. 441, 91 L. Ed. 408;

United States v. I. C. C., 337 U. S. 426, 93 L. Ed. 1451;

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 95 L. Ed. 817;

Hynes v. Grimes Packing Co., 337 U. S. 86, 93 L. Ed. 1231;

Williams v. Fanning, 332 U. S. 490, 92 L. Ed. 95;

Stark v. Wickard, 321 U. S. 288, 88 L. Ed. 733;

Youngstown Sheet & Tube v. Sawyer, 343 U. S. 579, 96 L. Ed. 1153.

These cases are analyzed in Point XIII of the joint reply of the remaining petitioners, and reference is hereby respectfully made to that discussion.

POINT II.

Members of Federal Home Loan Banks Have Proprietary and Justiciable Interests as Members of Such Banks.

Another point raised by the petition of Wilmington is that by the dissolution of the Los Angeles Bank and the creation of the San Francisco Bank, the stockholders of the Los Angeles Bank were deprived of proprietary and justiciable rights without hearing. Neither Fahey nor the San Francisco Bank adequately answer this point.

It does not follow from the fact that Federal Home Loan Banks are governmental agencies, that they have none of the aspects of proprietary corporations and that its members have no justiciable or property interests. On the contrary, the very case which Fahey cites proves his assertion to be wrong. We read in *Federal Land Bank v. Priddy,* 295 U. S. 229, 231, as follows:

> "In interpreting §4, it is to be borne in mind that federal land banks, although concededly federal instrumentalities, possess also some of the characteristics of private business corporations. See *Federal Land Bank v. Gaines, supra* (290 U. S. 254, 78 L. ed. 301, 54 S. Ct. 168). The statute does not contemplate that their stock is to be wholly, or even chiefly, government owned. Its acquisition by private investors is permitted, §5, and its subscription by the borrowing national farm loan association is compulsory, §7. The operations of the federal banks are, in the part at least, for profit, §5. In the conduct of their business they may enter into contracts, §4,

borrow money, receive interest and fees, §13, pay the expenses and commissions of agents, §15, and pay dividends on their stock, §5. While they are required to deposit in trust farm mortgages as security for farm loan bonds, §13, they may acquire and dispose of property in their own right, including land. §13. *They thus have many of the characteristics of private business corporations, distinguishing them from the government itself and its municipal subdivisions, and from corporations wholly government owned and created to effect an exclusively governmental purpose.* This is a circumstance which gives some support to the inference that the intended scope of the liability to suit includes judicial process incident to suit." (Emphasis ours.)

In consequence, this Honorable Court held that Federal Land Banks are subject to attachment and execution issued out of state courts. Nor does *Federal Land Bank of St. Paul v. Bismarck Lumber Co.,* 314 U. S. 95, hold that stockholders of Federal Land Banks do not have proprietary or justiciable interests in such institutions. On the contrary, it merely holds that in its character as an instrumentality of the Federal Government, it is exempt from State taxes.

The fact that these institutions are heavily subsidized by the United States Government does not invite the conclusion that its members have no proprietary or justiciable interest. In fact, they are not truly subsidized by the Federal Government. The Federal Government is an investor in them and, like any other investor, is entitled to have its investment returned in the event of a dissolution.

The fact that the corporate existence of the Bank may be terminated, does not indicate that a proprietary or

justiciable interest is lacking. The power of the United States Government to dissolve a Federal Home Loan Bank, whether the power is derived from the Act or from the Charter, issued pursuant to it, provides that the dissolution must be "under the Federal Home Loan Bank Act." This clearly means that the provisions of the Act must be followed in any dissolution. It is not the power of dissolution that is attacked in this case. This power, as long as it is exercised in conformity with the statutory provisions, is beyond dispute. It is the arbitrary, punitive, and unconstitutional use of the power which is the subject of complaint in these appeals.

Since the bank can be dissolved only "under the Federal Home Loan Bank Act," it must be proper for the members of the bank to complain if the provisions of the Federal Home Loan Bank Act were not followed. The Federal Home Loan Bank Act does not confer a naked power on the Board. On the contrary, the exercise of the power is circumscribed by precise provisions. These were set out in Wilmington's petition for certiorari, pages 32 to 38. Except for one, we shall not reiterate them.

It was not incumbent upon the Portland Bank to accept all of the assets of the Los Angeles Bank. The statute says that it "may" do so, but it is not compelled to do so. The fact is that the assets were transferred to the Portland Bank "without any resolution or request of the Portland Bank to assume any of the liabilities of the Los Angeles Bank" (Appeal No. 12591, p. 294). But the statute expressly provided that while the bank "may" acquire the assets, if it does, it must assume the liabilities. That the word "may" in this connection is not mandatory but clearly permissive appears from *Farmers & Merchants*

Bank v. Federal Reserve Bank, 262 U. S. 649, 67 L. Ed. 1157, 1165, where the words "may receive" were held to be,

> "words of authorization merely. It is true that in statutes the word 'may' is sometimes construed as 'shall.' But that is where the context, or the subject matter compels such construction. . . . Here it does not. This statute appears to have been drawn with great care. Throughout the act the distinction is clearly made between what the Board and the Reserve Banks 'shall' do and what they 'may' do."

Only Fahey makes an attempt to reply to the obvious fact that the members of the Los Angeles Bank suffered an actual financial loss by its liquidation. But, frankly, we do not understand his argument. In the case of Wilmington, so the answer maintains [No. 592, p. 10], the loss amounted to only $2,698.00, which is termed a "relatively insignificant" loss considering the large capital of the Los Angeles Bank. Pushed to its logical conclusion, this argument can only mean: You may destroy as much property of a corporation as you want, as long as you take care that the amount you take from each stockholder is "relatively insignificant."

The argument that the proprietary interests of the members of the bank were not involved is not helped by a reference to Section 6(i) of the Federal Home Loan Bank Act (12 U. S. C. §1426 (1)). That provision deals with individual withdrawing members or members that are expelled for disciplinary reasons. But when the entire bank is liquidated, the Act clearly requires that its stock be "paid off" (12 U. S. C. 1446), and this clearly means that not only $100.00 thereof be returned.

For still other reasons it is utterly wrong to say that the various members of the Bank have no proprietary interest therein Thus, they have a clear right to dividends (12 U. S. C. A. 1426 and 1436).

Next, the members have a right to have the stock paid off to them if the bank is liquidated (12 U. S. C. A. 1446).

Moreover, the right of any individual member to continue as a member of the bank is guaranteed for the corporate life of the bank and cannot be taken away except for cause (12 U. S. C. A. 1426, subd. (i)).

And finally, the members have voting rights. Those rights are valuable ones in any corporation. In that respect the question presented may be one of power, but surely that means that some impartial tribunal must exist to arbitrate disputes about the power. The San Francisco Bank has advanced no reason why it should be different in the case of a Federal Home Loan Bank. It refers to several cases on page 15 of its brief which are said to show that the loss of corporate voting power is not an invasion of a legally protected right That statement is palpably wrong. It is not supported by the cases cited. They all involve cases and acts of the Interstate Commerce Commission, either the adjustment of rates or the elimination of penalty charges or the long and short haul clause, and the only principle we gather from them is that shippers not directly affected by I. C. C. orders have no right before the courts because it is the express purpose of the I. C. C. to safeguard the interests of those members of the public who are not parties to the controversy at hand.

There are certain terms and conditions upon which one becomes a member of a Federal Home Loan Bank, but

this does not mean that one thereby loses any proprietary right or interest in the corporation and can henceforth be dealt with at the whim and pleasure of the Board. The fact, for instance, that stock may not be hypothecated except with the consent of the Board is a condition that is sometimes imposed in private corporations. Even private corporations may limit in their charter or by outside agreement, the alienability of their stock. But such agreements do not do away with the proprietary interests of the stockholders.

The bland assertion that the stockholders of a Federal Home Loan Bank have no proprietary interest in the corporation or its assets finds no support in any of the decided cases except in the very decision for the review of which we ask here for certiorari. The case of *Peoples' Bank v. Federal Reserve Bank of San Francisco,* 58 Fed. Supp. 25, which is referred to in San Francisco Bank's Brief (p. 16) is a case in which the member sought to enjoin the enforcement of a condition of membership to which it had previously assented. The court held that the party who imposed the condition, namely, the Federal Reserve Board, was not before the court and that the Federal Reserve Bank of San Francisco, *which was before the court,* had not imposed or exacted the condition.

The cases cited on page 17 of the brief of San Francisco Bank do not at all hold or even intimate that a person who acquires stock in a governmental corporation has no proprietary interest therein. One of them holds,

for instance, that a public utility has no right to be free from competition and therefore cannot challenge the constitutionality of the statute which created the Tennessee Valley Authority. (*Tennessee Electric Power Company v. Tennessee Valley Authority,* 306 U. S. 118.) Another case holds that private potential bidders on a government contract cannot question the correctness of the construction of a statute placed thereon by the Secretary of Labor. (*Perkins v. Lukens Steel Company,* 310 U. S. 113.) Similarly, the case of *Alabama Power Company v. Ickes,* 302 U. S. 462, merely holds that the taxpayer cannot enjoy what he conceives to be an unlawful use of Federal money, and, finally, *Massachusetts v. Melon,* 262 U. S. 447, holds that neither the state nor any of its taxpayers can enjoin, or raise the constitutionality of, the Maternity Act providing benefits out of Federal monies to those states which comply with the provisions of the Act and accept its terms.

No case, therefore, has been referred to which would show that the members of the Los Angeles Bank have no standing to maintain the Los Angeles action. The only case that does pass on the point is the very case which is the subject of this petition, and both the absence of authority on the subject and the importance of the question presented are an argument so strongly in favor of granting the petition for certiorari as to be, in our opinion, irrefutable.

POINT III.

The Los Angeles Action Is Not a Collateral Attack on Administrative Action.

Fahey also contends that the complaint in the Los Angeles action constitutes a collateral attack upon administrative orders, and that it does not allege any ground upon which the orders may be set aside.

But the attack is not collateral. The San Francisco Bank, under Orders 5082-5084 as muniments of title, claims to be entitled to the property in dispute. The orders are set out in the complaint. The Los Angeles action claims that these orders neither effect a dissolution of the Los Angeles Bank nor a transfer of its title, because they are "unlawful," "void," "wholly punitive" and "an arbitrary abuse of discretion . . . amounting to fraud in law." The precise question before the court is whether this two-fold accusation, namely *first,* that the orders are unlawful, and *second,* that they were fraudulent as alleged in the complaint, is true. The position of Fahey seems to be that the orders could not be unlawful, inasmuch as Sections 3, 25 and 26 of the Federal Home Loan Bank Act (12 U. S. C. 1423, 1445 and 1446) plainly authorize the orders. But, as the authorities in our petition have shown, not only those acts of the administrative power may be reviewed which are beyond the statutory grant of authority, but on review an inquiry may also be made to see whether the steps prescribed by the law, the safeguards contained in it, and the mode in which the

power is to be exercised, have been followed. In this respect, neither the petition of Fahey nor the answer of the San Francisco Bank makes any reply whatever to the matters contained on pages 32 to 38 of Wilmington's petition.

POINT IV.

The Los Angeles Action Does Not Ask for a Review of Questions Requiring Expert Knowledge.

The next argument of Fahey and the San Francisco Bank is that the orders in question should not be reviewed because, to use the words of Fahey (pp. 11-12),

> "these decisions are complex and delicate, and involve large elements of prophecy, specialized knowledge, information, and experience, and rest upon considerations not entirely susceptible of proof or disproof."

This statement entirely misconceives the nature of the relief which is sought in this case. In connection with these actions the District Court has never been asked to decide complex and delicate questions of banking, of expediency or of financial expertness. It has been asked to review the single question whether the power delegated by the Act to Fahey was abused and exercised for unfair, dictatorial, vindictive, punitive and fraudulent purposes. Questions of technical expediency, of expert knowledge, do not arise.

POINT V.

The Members of the Federal Home Loan Bank Board Are Not Indispensable Parties.

Fahey next contends that indispensable parties (namely the persons constituting the Federal Home Loan Bank Board) were not before the court, and that the court lacks jurisdiction over them. That argument has been met in great detail in the petitions already on file, but we add the following for this Honorable Court's consideration. The absent parties in this case are not required to take any action. The analogy with the steel seizure case is practically complete. In that case, the President who was not before the court had ordered the seizure of the steel mills and the transfer of the properties to the Secretary of Commerce. This Honorable Court directed the Secretary of Commerce to return the steel mills to their owners. In legal contemplation the seizure simply was never made because the power to make it was lacking.

> *Youngstown v. Sawyer*, 343 U. S. 579, 96 L. Ed. 1153, 72 S. Ct. 863.

In the instant case, if the allegations of the complaint are true, administrative orders Nos. 5082, 5083 and 5084 will be set aside, and a court so finding would merely declare that the state of affairs which existed before the seizure has in legal contemplation never been changed. It would first mean that the Los Angeles Bank has never been dissolved, and therefore it would not be necessary for the "indispensable parties" to make an order recreat-

ing the Los Angeles Bank, just as it was not necessary that the President of the United States should have made an order returning the seized steel mills to the owners. Likewise, no election is necessary because the persons that were officers of the bank in 1946 would still be officers, and the Federal Home Loan Bank Act provides ample means for the filling of vacancies that may have occurred.

Similarly, the dissolution of the San Francisco Bank would not be required. Since under 12 U. S. C., Section 1423, the Board has power to have not less than eight and not more than twelve Federal Home Loan Bank Districts, it would not be necessary for it to dissolve the San Francisco Bank, and therefore the reactivation of the Portland Bank would, likewise, be unnecessary. It certainly would not require the members of the Home Loan Bank Board to make the segregation of San Francisco's assets. In fact, none of the steps which are suggested as necessary and indispensable to be performed by the Federal Home Loan Board to restore the *status quo* are required. A simple judgment that the Los Angeles Bank still exists and that those of the assets of the Los Angeles Bank which were transferred to the San Francisco Bank must be returned, would grant the complete relief to which the Los Angeles Bank is entitled, and for that complete relief, no *in personam* decree against the members of the Federal Home Loan Bank Board is necessary.

Since the Board would not take any affirmative action, its members are not indispensable under the principles laid down in *Williams v. Fanning,* 332 U. S. 490.

As in the court below, so it is argued once more by the San Francisco Bank that the action cannot be maintained in the District of Southern California. Again, the only case cited in support of this position is the very case before this Honorable Court. The San Francisco Bank clearly and unmistakably is before the court. It is in possession of the assets which it has received by virtue of unlawful orders. This controversy, therefore, can be settled without the presence of the wrongful transferor.

The argument that the members of the Home Loan Bank Board are indispensable and that their personal appearance is required so that no effective decree can be rendered in their absence leads to an intolerable impasse. If they are joined in the action in California, they object to the jurisdiction of the court. When, on the other hand, the members are sued in the District of Columbia where they say they are amenable to process, it will be impossible to bring the San Francisco Bank before that court, so that, on respondents' theory, whichever tribunal is chosen, indispensable parties will be absent and the judicial power of the United States will not avail to give petitioners any remedy. For these reasons it must follow that the controversy should be adjudicated in the forum in which the property is located, and in which the persons are located which have it in their physical power to return the assets to their rightful owners.

POINT VI.

The Los Angeles Action Is Not in Fact a Suit Against the United States Government Without Its Consent.

Throughout their replies, respondents maintain that the suits against the San Francisco Bank are in fact suits against the government without its consent.

Congress, as the argument runs, both in the opinion of the court in the Los Angeles action and in the answer of the San Francisco Bank (p. 13) has pre-empted the field of banking activities in connection with home financing institutions. On the contrary, however, Federal Home Loan Banks while they wield life and death power over Federal Savings and Loan Associations, are still in competition with private lending institutions and some lending and financing even by Federal Savings and Loan Associations is done through institutions other than the Federal Home Loan Banks.

But even though Congress had pre-empted the entire field of home loan banking, it does not follow that the agency in which it has vested this pre-empted power is immune to suit. Congress has deliberately chosen the corporate form of organization for Home Loan Banks, it has deliberately provided that private capital may be contributed to that form of organization, and the amount of capital which the United States may contribute is strictly limited (12 U. S. C. Sec. 1426(f)).

Moreover, Congress has made these governmental organs expressly subject to suit (12 U. S. C. A. 1432) and

inasmuch as this provision is subject to no qualification or restriction whatever, it is clearly erroneous to say that the bank cannot be sued by persons who have a grievance. If Congress had wanted to do so, it would have conferred the immunity of the government upon these organizations, but it chose not to do it.

The corporate form having thus been chosen and the statutory creation of Congress having been given the right to sue and to be sued, the purported intention of Congress to clothe these banks with governmental immunity nowhere appears. To argue that the suit against the bank is in effect a suit against the government certainly avails nothing inasmuch as the sovereign can waive the immunity and in this case by the express wording of the Act has waived it. These principles were extensively discussed and firmly established in *Federal Land Bank v. Priddy,* 295 U. S. 229, 79 L. Ed. 1408, and *Keifer v. Reconstruction Finance Corporation,* 306 U. S. 381, 59 S. Ct. 516, 83 L. Ed. 784.

Conclusion.

In conclusion, it is again respectfully submitted that the opinion in the Los Angeles action raises questions of the utmost importance to the development and clarification of our system of administrative law. The opinions themselves virtually invite this Honorable Court to say the last word in these far-reaching controversies. Furthermore, the opinions contain pronouncements which virtually provoke further arbitrary action on the part of adminis-

trative officers. They can well be construed as a license to them to use administrative powers to further their own whim, caprice or desire to dictate. The almost universal human will for power needs no judicial encouragement. For all of these reasons, as well as for the reasons advanced in the petitions but not reiterated here, we respectfully urge the granting of certiorari.

Respectfully submitted,

W. I. GILBERT, JR.,

Attorney for Wilmington Federal Savings and Loan Association and for W. I. Gilbert, Jr.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 594

ERNEST R. UTLEY, as Receiver for Federal Home Loan Banks of Los Angeles, Portland, or San Francisco, Whichever Exists,

Petitioner,

vs.

JOHN H. FAHEY, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Respondents.

Answer of Receiver Utley to Brief of Respondent Federal Home Loan Bank of San Francisco and Respondents Fahey, Ammann, Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, Divers, Adams, La Roque, Heisler, and Bramley in Opposition.

This reply is filed on behalf of Ernest R. Utley, as Receiver, in Petition No. 594. It is in answer to the separate memorandum of respondents Fahey, *et al.*, as well as to the argument found on pages 33-35 of the brief of San Francisco Bank.

Respondents first object to the receiver's petition on the ground that he was not a party to the proceedings below. This is not entirely correct. That he was not

a party to the original suits is true enough, but he is not a stranger to the record. A receiver was appointed before either of the opinions of the Appellate Court were handed down. The order appointing him was appealed in the consolidated actions. That appeal was pending when the Los Angeles action was dismissed by order of the Court of Appeals. He petitioned for a rehearing, and his petition was denied with the others. Nobody denies his appointment in the very actions in which certiorari has been asked for. The authorities cited in the memorandum of respondents Fahey and others are not in point and do not indicate that the receiver has no standing to petition. In all of them, people were involved who were complete strangers to the record.

The next point that is made against the receiver and his petition is that he is not impartial. He is, of course, aggrieved by the order of the Court of Appeals dismissing the actions in which he was appointed. This has the clear effect of removing him and terminating his authority to do anything further in the suits he has started pursuant to the order of the appointment. To that extent he cannot be impartial. He certainly should be in a position to urge that the dismissal was erroneous. By doing so, he does not take sides in the lawsuit, because only the ultimate decision of the questions presented, to wit, whether the Los Angeles Bank was properly or improperly dissolved, will decide to whom will inure the fruits of the litigation he had commenced pursuant to the order of appointment.

This appointment is clearly for the limited purpose of preserving certain causes of action, but the dismissal of the complaint makes that limited function impossible.

It has been continuously contended by respondents that the *Mallonee* action was not maintainable at all until further administrative remedies had been exhausted. It seems that a similar contention is not made with respect to the Los Angeles action.

When the receiver was appointed, a number of causes of action were about to become outlawed by the short Statute of Limitations of California. If the courts' hands were tied to do anything until the alleged administrative remedies were exhausted by the parties, these actions would have been lost to whichever one of the parties will eventually be entitled to the fruits thereof, and if the decisions of the Court of Appeals herein are permitted to have the effect of terminating the receiver's authority to proceed with the suits which he has already instituted, and to hold that matter in abeyance until administrative remedies have been exhausted, the causes of action in question will be lost forever, because already at this very moment the statute of limitations has run as to all of them and they can be preserved only by continuing the authority of the receiver, who instituted them in time, to continue with their prosecution.

If it were the law that the statute of limitations is tolled while parties pursue administrative remedies, the foregoing argument might lose its urgency, but there can be no doubt since the decision of this Honorable Court

in *Unexcelled Chemical Corporation v. United States of America,* 97 Adv. Rep. Law Ed. No. 9, page 486, that the statute of limitations begins to run when the cause of action accrues and is not suspended while the parties seek redress by pursuing their administrative remedies.

For the foregoing reasons, as well as for the reasons advanced in the petition of the receiver, it is respectfully urged that certiorari be granted herein.

Respectfully submitted,

W. I. GILBERT, JR.,

Attorney for Ernest R. Utley as Receiver for Federal Home Loan Bank of Los Angeles, Portland or San Francisco, whichever exists.

SUBJECT INDEX

PAGE

Petitioner is a party to the record of the Court of Appeals and he is bound by the stay order 2

Court of Appeals order wipes out petitioner's legal remedy for recovery of personally owned property 2

Tax Court subpoena is not a legal remedy to try title to property 3

TABLE OF AUTHORITIES CITED

CASES PAGE

United States v. Union Trust Co. of Pittsburgh, 13 Fed. Supp. 286, 53 Stats. 471 3

RULES

Rules of Practice of the United States Tax Court, Rule 44(c) 3

STATUTES

United States Code, Title 26, Sec. 1100 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.
No. 658

JOHN D. WILLHOIT,

Petitioner,

vs.

JOHN H. FAHEY, *et al.,* and FEDERAL HOME LOAN BANK OF SAN FRANCISCO,

Respondents.

PETITIONER'S REPLY BRIEF.

The petitioner desires to present this short reply brief relating to respondents' points which were not raised in the brief supporting petition for certiorari.

Since the date of filing petition for certiorari, this Court filed an opinion in the case of *Unexcelled Chemical Corp. v. United States of America,* October Term, 1952, No. 293, which supports the petitioner's authorities holding that where a District Court had jurisdiction of the subject matter and the parties, and in the course of litigation an administrative problem arose, the action in the District Court should be stayed pending the conclusion of the administrative proceeding.

Petitioner Is a Party to the Record of the Court of Appeals and He Is Bound by the Stay Order.

Respondents in their memorandum state a general principle of law to the effect that one who is not a party to a record and judgment is not entitled to appeal therefrom. The cases cited uphold that statement of law.

The petitioner is in an entirely different category than the unsuccessful parties in the cases cited by respondents. Petitioner is a party to the record [W. R. 92, 99, 113]. Counsel for petitioner appeared before Court of Appeals on November 7, 1952, in opposition to respondents' motion for order staying proceedings in the District Court [W. R. 113]. The petitioner is bound by the order of Court of Appeals staying proceedings in the District Court [W. R. 114]. Petitioner filed his record in the Court of Appeals pursuant to order of that Court [W. R. 117], and that record is now before this Honorable Court. The petitioner is a party to the record and he is bound by the order staying proceedings in the District Court.

Court of Appeals Order Wipes Out Petitioner's Legal Remedy for Recovery of Personally Owned Property.

The new second point raised by respondent not presented in the petition for certiorari is "* * * it is difficult to understand how the decisions of the Court of Appeals have prejudiced the petitioner's claim for the return of the allegedly withheld records." The qualifying adverb "allegedly" is misleading and implies a triable issue

of fact. This is not a correct statement of the record before this Honorable Court. The truth of the matter is that, after the complaint was filed in the District Court, respondents surrendered material Tax Court evidence consisting of 134 original cancelled checks belonging to petitioner in the total sum of $1,036,044.52 [W. R. 78]. The Court of Appeals order staying all District Court proceedings wipes out the petitioner's right to pursue his legal remedy for recovery of his privately owned property.

Tax Court Subpoena Is Not a Legal Remedy to Try Title to Property.

Respondents raise a new third point in stating that, "* * * a subpoena issued under Rule 44(c) of Rules of Practice of Tax Court of the United States would have served the same purposes as the lengthy complaint." A subpoena is not a legal remedy for the recovery of privately owned property. The Tax Court is not a court in the judicial sense. It is an administrative agency, "* * * an independent agency of the Executive Branch of the Government" (26 U. S. C. 1100). The Tax Court has no power to enforce its subpoenas. This is accomplished by District Court proceedings, *United States v. Union Trust Co. of Pittsburgh,* 13 Fed. Supp. 286, 53 Stats. 471.

Petitioner's action is in pursuit of legal remedies including [W. R. 68],

1. Replevin return of seized tax records;

2. Special damages;
3. General damages;
4. To enforce judgments;
5. For declaratory relief;
6. Accounting;
7. General relief;
8. Costs.

A Tax Court subpoena will not serve the same purposes as the petitioner's action in the District Court.

It is respectfully submitted that the points presented by respondents are not applicable, and the petition for certiorari should be granted.

EMMETT E. DOHERTY,
Attorney for Petitioner.

MAY 1 9 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

Nos. 591, 592, 593, 594, 595, 596 and 658.

MALLONEE, BUCKLIN and FERGUS, SHAREHOLDERS' PROTECTIVE COMMITTEE, and LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, *et al.*,

Petitioners,

vs.

FAHEY, AMMANN, as Conservator, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Respondents.

JOINT PETITION FOR REHEARING OF DENIAL OF CERTIORARI PETITIONS.

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SUBJECT INDEX

PAGE

Question presented 2

Statement 2

A. En banc rehearing by the Court of Appeals cannot be denied by a single division 3

1. En banc rehearing was required by conflicts in the Court of Appeals 3

2. Conflict in decisions between different panels of the same Court of Appeals on the same questions of law 4

3. Important jurisdictional questions should have been considered by the Court of Appeals en banc 5

B. Rehearing en banc not discussed in original certiorari petitions 6

Conclusion 7

TABLE OF AUTHORITIES CITED

Cases	Page
Banks Warehouses, Inc. v. Watt, No. 226, Oct. Term, 1952, decided Apr. 13, 1953	7
Bradley Mining Co. v. Boice, No. 648, Oct. Term, 1951, decided Apr. 13, 1953	6, 7
Fahey, et al. v. Mallonee, et al., 332 U. S. 245, 91 L. Ed. 2030	3
Fahey, et al. v. O'Melveny & Myers, et al., 200 F. 2d 420	5
Fahey, Ex parte, 332 U. S. 258, 91 L. Ed. 2041	3
Home Loan Bank Board, et al. v. Mallonee, et al., 196 F. 2d 336	5
Schriber-Schroth v. Cleveland Trust, 305 U. S. 47, 83 L. Ed. 34	6
Trans-Pacific Airlines v. Hawaiian Airlines, 174 F. 2d 63	5
Western Pacific R. Corp. v. Western Pacific R. Co., Nos. 150, 160, Oct. Term, 1952, decided Apr. 6, 1953	1, 2, 6, 7
Western Pac. R. Corp. v. Western Pac. R. Co., 197 F. 2d 1013	2, 4, 7
White v. Texas, 310 U. S. 530, 84 L. Ed. 1342	6
United States v. Sentinel Insurance, 178 F. 2d 217	6

IN THE

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OCTOBER TERM, 1952.

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MALLONEE, BUCKLIN and FERGUS, SHAREHOLDERS' PROTECTIVE COMMITTEE, and LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, *et al.*,

Petitioners,

vs.

FAHEY, AMMANN, as Conservator, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Respondents.

JOINT PETITION FOR REHEARING OF DENIAL OF CERTIORARI PETITIONS.

To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners respectfully request a rehearing by the United States Supreme Court of their respective petitions for certiorari, filed February 9, 1953, all of which were prior to the publication of *Western Pacific R. Corp. v. Western Pacific R. Co.*, Nos. 150 and 160, October Term, 1952, decided April 6, 1953, in which the United States Supreme Court reversed the Court of Appeals for the Ninth Circuit for refusing to consider a petition for

hearing *en banc,* and remanded to the Court of Appeals for consideration of such *en banc* petitions, in the light of the United States Supreme Court's decision of said case.

Question Presented.

Whether an order of a single division of the Court of Appeals denying petitioners' rehearing *en banc,* sought because of direct conflicts between several different panels of the same Court of Appeals in the same, and other litigation, should be reversed so that the whole Court of Appeals may consider the question of hearing *en banc* in the light of the United States Supreme Court's subsequent decision of *Western Pac. R. Corp. v. Western Pac. R. Co., supra,* decided April 6, 1953.

Statement.

Petitioners' timely-filed petitions for hearing *en banc* were denied by orders of the same panel of the Court of Appeals which had heard the appeals [Apl. No. 12511, R. 11685, and Apl. No. 12591, R. 1036]. The denial of petitions for hearing *en banc* were made at a time[1] when the Court of Appeals considered itself bound by its opinion in *Western Pac. R. Corp. v. Western Pac. R. Co.,* rendered July 9, 1952, reported in 197 F. 2d at 1013, and reversed by the United States Supreme Court April 6, 1953, after filing of petitioners' certiorari petitions herein.

In reliance on such opinions, a single division of the Court of Appeals in both cases denied petitioners' application for *en banc* rehearing without consideration by the whole Court [see R. 11685 in Apl. No. 12511, and R. 1036 in Apl. No. 12591].

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[1]As to Appeal No. 12511, November 13, 1952, and as to Appeal No. 12591, December 17, 1952.

A. En Banc Rehearing by the Court of Appeals Cannot Be Denied by a Single Division.

1. En Banc Rehearing Was Required by Conflicts in the Court of Appeals.

There are exactly contrary positions between the panel deciding the two appeals from which certiorari is herein sought and previous decisions of other panels of the same Court of Appeals in this same litigation.

In September, 1946, Circuit Justice William E. Orr wrote the opinion of the statutory three-judge court, found in 68 Fed. Supp. 418, and reversed by the United States Supreme Court in *Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030.

In December, 1947, a panel of the Court of Appeals, composed of Justices Clifton Mathews, Albert Lee Stephens, and William E. Orr (Justice Orr later withdrew and was replaced by Justice William Healy), after filing of printed briefs and full oral argument, and in reliance on the mandate of the United States Supreme Court in *Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030, and *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041, denied stays of execution then sought by the present respondents.

Thereafter the appeals in which such proceedings were had were dismissed.

In February, 1950, present respondents sought writs of prohibition, mandamus or other appropriate writs from the Court of Appeals to prohibit and prevent District Judge Peirson M. Hall from any further proceedings in the consolidated cases in the Court below. The applications for such writs of prohibition, mandamus, etc., were considered by panels of the Court of Appeals originally

composed of Circuit Justices Clifton Mathews, Homer T. Bone, and Walter L. Pope, and later of Justices Clifton Mathews, William Healy, and Homer T. Bone. Such applications of respondents for writs of prohibition, mandamus, etc., were denied by said panels of said Court of Appeals, without opinion.

Neither Justices Mathews, nor Pope, nor Orr, who had previously participated in conflicting rulings in these same questions by this same Court of Appeals was accorded any opportunity to consider the opinions of such different panel, either en banc or otherwise.

Such consideration was prevented by the application of the opinion of the Court of Appeals in *Western Pac. R. Corp. v. Western Pac. R. Co.*, 197 F. 2d 1013, now reversed by the United States Supreme Court.

2. Conflict in Decisions Between Different Panels of the Same Court of Appeals on the Same Questions of Law.

In the opinion in 196 F. 2d 336, Appeal No. 12511, filed April 2, 1952, the panel of the Court of Appeals composed of Justices Stephens, Healy and Bone, held that no action could be filed in the District Court to be held by the Court pending completion of administrative procedures, and said:

> "The doctrine of exhaustion of administrative remedies requires not merely the initiation of prescribed administrative procedures; it requires pursuing them to their appropriate conclusion and awaiting their final outcome before seeking judicial intervention. . . ."

but in *Trans-Pacific Airlines v. Hawaiian Airlines,* 174 F. 2d 63 (C. C. A. 9, 1949), a different panel of the same Court of Appeals composed of Justices Mathews and Orr, and District Judge James Alger Fee, in deciding the same question, held the District Court—

> ". . . should have held the cause in abeyance until the board made a primary determination . . ."

3. Important Jurisdictional Questions Should Have Been Considered by the Court of Appeals En Banc.

Because of the conflict between the various panels of the Court of Appeals which have previously (in 1947 and 1950), made decisions on jurisdiction of the District Court in conflict with, and contrary to, the 1952 opinions[2] (the subject of petitioners' present certiorari applications), and because of the conflict between the other panels of the same Court of Appeals (on the same questions of jurisdiction of the District Courts), rendered in other litigation,[3] both the litigants and the United States Supreme Court should have been accorded the benefit of a hearing *en banc.*

By such hearing, the 200 pages of opinions of the Court of Appeals and the large number of questions presented in petitioners' certiorari applications, could have been drastically reduced in number, so that a single simple issue could have been presented to the United States Supreme Court for its authoritative decision.

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[2]*Home Loan Bank Board, et al. v. Mallonee, et al.,* 196 F. 2d 336; *Fahey, et al. v. O'Melveny & Myers, et al.,* 200 F. 2d 420.

[3]*Trans-Pacific Airlines v. Hawaiian Airlines,* 174 F. 2d 63 (C. C. A. 9, 1949).

The Fifth Circuit in *United States v. Sentinel Insurance,* 178 F. 2d 217 (1949), considered appeals *en banc* because of important jurisdictional questions presented by interpleader proceedings involving Collector of Internal Revenue, federal receivers, and claimants, diversity of whose citizenship was doubtful.

B. Rehearing en Banc Not Discussed in Original Certiorari Petitions.

Petitioners did not mention in their original petitions for certiorari the denial by the Court of Appeals for the Ninth Circuit of their petitions for rehearing *en banc,* because the decision of this Honorable United States Supreme Court in *Western Pacific R. Corp. v. Western Pacific R. Co.,* Nos. 150 and 160, October Term, 1952 (decided April 6, 1953), was then not yet announced.

Petitioners therefore did not desire to burden their several petitions with yet another point. However, in *Bradley Mining Co. v. Boice* (No. 648, Oct. Term, 1951, decided April 13, 1953), denial of rehearing *en banc* by the Court of Appeals was brought to the attention of the Supreme Court for the first time in petitions for rehearing by the Supreme Court after denial of certiorari.[4]

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[4]In *White v. Texas,* 310 U. S. 530, 84 L. Ed. 1342, rehearing after denial of certiorari was granted because of a subsequent decision of the Supreme Court. In *Schriber-Schroth v. Cleveland Trust,* 305 U. S. 47, 83 L. Ed. 34, after denial of certiorari, rehearing was granted because of new grounds shown for the first time in rehearing petitions.

Conclusion.

Following its decision in *Western Pacific R. Corp. v. Western Pacific R. Co.* (Nos. 150 and 160, Oct. Term, 1952, decided April 6, 1953), the United States Supreme Court in *Bradley Mining Co. v. Boice* (No. 648, Oct. Term, 1951, decided April 13, 1953), vacated its order denying certiorari, granted the petitions for writs of certiorari, vacated the orders of the division of the Court of Appeals denying petitions for rehearing *en banc,* and remanded to the Court of Appeals for further proceedings in the light of *Western Pacific R. Corp. v. Western Pacific R. Co., supra.*

The United States Supreme Court also, in *Banks Warehouses, Inc. v. Watt* (No. 266, Oct. Term, 1952, decided April 13, 1953), granted certiorari petitions, vacated the order of the division of the Court of Appeals denying petitions for rehearing *en banc,* and remanded to the Court of Appeals for further proceedings in the light of *Western Pacific R. Corp. v. Western Pacific R. Co., supra.*

Petitioners respectfully suggest that similar treatment be accorded their petitions for certiorari so that the conflicts between the previous decisions of the Court of Appeals in this same litigation, in denying writs of prohibition in 1950, denying stay of proceedings, and dismissing previous appeals in 1947, and the 1952 opinions that the entire litigation has at all times been:

> ". . . beyond the jurisdiction of the District Court over the subject matter . . ."

may be reconciled or clarified by hearing *en banc*, wherein the differing views of *six of the seven members of the said Court of Appeals in this same litigation may be jointly considered by all of them en banc.*

Respectfully submitted,

CHARLES K. CHAPMAN,
Attorney for Petitioner Long Beach Federal Savings and Loan Association.

W. I. GILBERT, JR.,
Attorney for Petitioners Ernest R. Utley, Receiver, and First Federal Savings and Loan Association of Wilmington.

F. HENRY NE CASEK,
Attorney for Petitioners Homeowners and George Turner.

WYCKOFF WESTOVER,
Attorney for Petitioner Mallonee, et al. (Shareholders' Protective Committee).

LYMAN B. SUTTER,
Attorney for Petitioner Title Service Company, Trustee on Deeds of Trust, of 8000 Homeowners.

RAYMOND TREMAINE,
Attorney for Petitioner Robert H. Wallis.

EMMETT E. DOHERTY,
Attorney for Petitioner John D. Willhoit.

Certificate of Counsel.

Each of the undersigned hereby respectively certify that the foregoing joint petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 33 of the Rules of the United States Supreme Court.

CHARLES K. CHAPMAN,
WYCKOFF WESTOVER,
W. I. GILBERT, JR.,
LYMAN B. SUTTER,
F. HENRY NE CASEK,
RAYMOND TREMAINE,
EMMETT E. DOHERTY.

In the Supreme Court of the United States

OCTOBER TERM, 1952

Nos. 591, 592, 593, 594, 595, 596, and 658

MALLONEE, BUCKLIN, AND FERGUS, SHAREHOLDERS' PROTECTIVE COMMITTEE, AND LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, ET AL., PETITIONERS

v.

FAHEY, AMMANN, AS CONSERVATOR, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, ET AL., AND SIX RELATED CASES.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENTS IN OPPOSITION TO THE JOINT PETITION FOR REHEARING

The respondents oppose the joint petition for rehearing of the denial of petitioners' petitions for writs of certiorari.

1. Petitioners seek to obtain a rehearing on the basis of the recent decisions of this Court in *Western Pacific Rd. Corp.* v. *Western Pacific*

256226—53

Rd. Co., 345 U. S. 247, *Bradley Mining Co.* v. *Boice*, 345 U. S. 932, and *William H. Banks Warehouses, Inc.* v. *Watt*, 345 U. S. 932. In those instances this Court vacated judgments of the Court of Appeals for the Ninth Circuit and remanded them for further proceedings on the ground that the court below had not properly disposed of petitions for rehearing *en banc*, expressly addressed to the full Court of Appeals, presenting a full and explicit argument why a rehearing *en banc* was necessary in the particular circumstances.[1]

The instant petition for rehearing is not predicated on comparable serious petitions for rehearing *en banc* in the court below. To the extent that petitions for rehearing *en banc* were filed at all in the Court of Appeals,[2] they were ordinary petitions for rehearing to which the words *en banc* were apparently added as a matter of routine.[3]

That petitioners did not seriously ask for a hearing *en banc* in the Court of Appeals appears

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[1] *Western Pacific Railroad Case*, No. 150, R. 2263; *Banks Warehouses, Inc.* v. *Watt*, No. 266, R. 687–688, 695; *Bradley Mining Co.* v. *Boice*, No. 648, 1951 Term, Petition for Rehearing, p. 3, and see dissenting opinion of Pope, J., 198 F. 2d 790, 792.

[2] See *infra*, pp. 5–8.

[3] In *Western Pacific R. R. Corp.* v. *Western Pacific R. Co.*, 197 F. 2d 994 (C. A. 9), Healy, J., pointed out (at 1013, fn. 1) that "it has become the custom of counsel almost as a matter of course to petition the full membership of the court for a rehearing in banc, upon suffering an adverse decision at the hands of a court of three judges."

from the circumstance that the request for the hearing was made in the alternative, using such terms as "either in bank or before the same panel," or "in banc or otherwise." Moreover, these alternative requests were contained only in the formal Introductions and Conclusions. The body of none of the petitions for rehearing *en banc* contained any explicit discussion directed to reasons why a rehearing *en banc* was desirable or necessary. The argument made to this Court in the instant petition that the decision below created an intra-circuit conflict was never addressed to the Court of Appeals (cf. *Magnum Co.* v. *Coty,* 262 U. S. 159, 163).[4]

2. Moreover, the procedure followed by the court below in disposing of the petitions for rehearing *en banc* was in substantial compliance with the requirements laid down in the *Western Pacific Railroad Case,* 345 U. S. 247, 260–263. In *Western Pacific R. R. Corp.* v. *Western Pacific R. Co.,* 197 F. 2d 994, 1013–1016 (C. A. 9), decided on July 9, 1952, the Court of Appeals

[4] Petitioners claim that the decisions below are in conflict with decision of other panels of the court of appeals denying stays of execution and writs of prohibition and mandamus. The issues presented on such applications, of course, are quite different from those involved in an appeal on the merits. The consistency between the instant decisions and the earlier ones appears from the circumstance that Judge Healy participated in the denials of stay of execution, and Judges Healy and Bone, both members of the panel below, denied the petitions for writs of prohibition and mandamus (Joint Petition for Rehearing, pp. 3–4).

had adopted rules to govern future applications for petitions for rehearing *en banc*. These rules, adopted in the exercise of the court's "uncontrolled discretion$" (197 F. 2d at 1016), established a procedure in which the full court delegated the responsibility for the initiation of the *en banc* power to the division to which the case was assigned for determination; the rules do not deny the litigants the opportunity to suggest to the panel of the Court of Appeals the desirability of a rehearing *en banc*. Acting in accordance with these rules, the panel in the instant case, according to the recitals in the orders (*infra*, p. 9 and p. 10), considered the request for rehearing *en banc* separately from the issue whether rehearing should be granted at all (cf. 345 U. S. at 262). The record thus indicates that there was consideration by the panel of the petitions for rehearing *en banc*, and that the panel denied the petitions on the merits in the exercise of the powers delegated to it by the full Court of Appeals. The proceedings in the instant case do not disclose any of the ambiguities present in the *Western Pacific Railroad Case*, 345 U. S. 247, 263, 267, or in *Bradley Mining Co.* v. *Boice*, 198 F. 2d 790 (C. A. 9), vacated, 345 U. S. 932, in which the panel denied the second petition for rehearing *en banc* possibly not on the merits but on the jurisdictional ground that petitioner "has had its appeal and its op-

portunity for certiorari or other relief in the Supreme Court. It is not entitled to pursue the process a second time" (at 791).

In the instant case, petitioners' perfunctory and unsupported petitions for rehearing *en banc,* in the alternative, were considered and denied on the merits by a panel to which the authority to make this decision had been delegated. We submit that the instant petition does not present any of the reasons which caused the vacating of the decisions in the *Western Pacific Railroad, Bradley Mining,* and *Banks Warehouses* cases.[5]

3. To this point, we have assumed that petitions for rehearing *en banc* were filed by all nine petitioners in the instant case.[6] This, however, is not the case. Petitioners seek review of two judgments in the Court of Appeals, Nos. 12511 (the *Long Beach* case) and 12591 (the *Los Angeles* case). If the petitioners for rehearing in this Court, each of whom complains of the failure of the court below properly to dispose of his petition for rehearing *en banc,* had all filed such petitions

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[5] In the last case, the petition for rehearing *en banc* was denied on June 19, 1952 (see 196 F. 2d 1018), *i. e.*, prior to the delegation of authority to the panel to pass on such petitions.

[6] The joint petition for rehearing has been filed on behalf of Long Beach, Mallonee, *et al.* (Shareholders), Utley, Wilmington, Title Service Co., Home Investment Co., Turner, Wallis, and Willhoit (Pet. for Rehearing, p. 8). W. I. Gilbert, petitioner in No. 592, has not joined the petition for rehearing.

in the Court of Appeals, eighteen petitions for rehearing *en banc* would have been filed. Actually, the orders denying the petitioners for rehearing and rehearing *en banc* (*infra,* pp. 9–10) disclose that only two petitions for rehearing *en banc* were filed in the Court of Appeals in No. 12511, *viz,* by Long Beach and Home Investment Co., and three in No. 12591, *viz,* by Long Beach, Mallonee, *et al.,* and Utley.[7]

Since the claim that the court below improperly disposed of their petitions for rehearing *en banc* is the only ground upon which petitioners base

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[7] The recitals of the Court of Appeals' orders have been checked against the petitions for rehearing on file with the Court of Appeals for the Ninth Circuit. The files indicate that the following petitioners did not file any petitions for rehearing at all in the following cases:

In No. 12511: Wilmington, Gilbert, Utley, Turner, and Willhoit.

In No. 12591: Home Investment Co., Wallis, Turner, Title Service, and Willhoit.

Petitions for rehearing but not for rehearing *en banc* were filed as follows:

In No. 12511: Mallonee, Bucklin, and Fergus (Shareholders' Protective Committee), Wallis, Title Service Company.

In No. 12591: Wilmington (W. I. Gilbert, Jr.)

The absence of serious consideration given by petitioners to their requests for rehearing *en banc* appears from the circumstance that the same attorney who prepared the rehearing petitions for Wilmington and Utley added the words, "*en banc* or otherwise" to the conclusion of the Utley petition but omitted them in the Wilmington petition. And the request of Mallonee, *et al.* for a rehearing *en banc* in No. 12591 appears to be predicated only on the fortuitous circumstance that in No. 12591 they joined the Long Beach petition for rehearing but submitted a separate one in No. 12511.

their joint petition for rehearing in this Court, the instant petition for rehearing is unsupported *in fact* as to the following petitioners:

No. 591, to the extent that Mallonee, Bucklin and Fergus (Shareholders' Protective Committee) seek review of the judgment of the Court of Appeals in No. 12511 (Long Beach case);[8]

No. 592, in its totality;[9]

No. 593, to the extent that petitioner seeks review of the judgment of the Court of Appeals in No. 12591 (Los Angeles case);[10]

No. 594, to the extent that petitioner seeks review of the judgment of the Court of Appeals in No. 12511 (Long Beach case);[11]

No. 595, in its totality;[12]

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[8] Mallonee, et al. (Shareholders' Protective Committee), petitioner in No. 591, did not ask for rehearing *en banc* in No. 12511 (Long Beach case).

[9] Wilmington, one of the petitioners in No. 592, did not file a petition for rehearing in No. 12511 (Long Beach case) and did not ask for rehearing *en banc* in No. 12591 (Los Angeles case). Gilbert, the other petitioner in No. 592, does not join the joint petition for rehearing.

[10] Home Investment Co., petitioner in No. 593, did not file a petition for rehearing in No. 12591 (Los Angeles case).

[11] Utley, petitioner in No. 594, did not file a petition for rehearing in No. 12511 (Long Beach case).

[12] Wallis, one of the petitioners in No. 595, did not ask for rehearing *en banc* in No. 12511 (Long Beach case) and did not file a petition for rehearing in No. 12591 (Los Angeles case). Turner, the other petitioner in No. 595, did not file any petition for rehearing.

No. 596, in its totality;[13]
No. 658, in its totality.[14]

CONCLUSION

It is respectfully submitted that the petition for a rehearing should be denied.

ROBERT L. STERN,
Acting Solicitor General.
SYLVESTER HOFFMANN,
Attorneys for Respondents.

MAY 1953.

---

[13] Title Service Co., petitioner in No. 596, did not ask for rehearing *en banc* in No. 12511 (Long Beach case) and did not file a petition for rehearing in No. 12591 (Los Angeles case).

[14] Willhoit, petitioner in No. 658, did not file any petition for rehearing.

APPENDIX

[12591 R. 1036]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Title of Cause]

EXCERPT FROM PROCEEDINGS OF WEDNESDAY, DECEMBER 17, 1952

Before: STEPHENS, HEALY and BONE, *Circuit Judges.*

ORDER DENYING PETITION FOR REHEARING, ETC.

Upon consideration of the petitions of the appellees Mallonee, et al. (Shareholders Protective Committee), and Long Beach Federal Savings and Loan Association, and the petition of appellee Ernest R. Utley, Receiver, for a rehearing en banc, filed Dec. 6, 1952, It Is Ordered that said petitions be, and they hereby are denied.

Upon consideration of the petitions, filed December 6, 1952, and within time allowed therefor by rule of court, by appellees Mallonee, et al., and Long Beach Federal Savings & Loan Association, by First Federal Savings & Loan Association of Wilmington and W. I. Gilbert, Jr., and by Ernest R. Utley, Receiver, for a rehearing of above cause, It Is Ordered that said petitions be, and they hereby are denied.

It Is Further Ordered that the mandate of this court in the above-entitled cause be, and hereby is stayed to and including January 31, 1953.

[12511 R. 11684]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Title of Cause]

EXCERPT FROM PROCEEDINGS OF THURSDAY, NOVEMBER 13, 1952

Before: STEPHENS, HEALY and BONE, *Circui Judges.*

ORDER DENYING PETITIONS FOR REHEARING

Upon consideration of the Petitions of Th Long Beach Federal Savings & Loan Associatio and of the appellees Home Investment Compan of Long Beach, et al., intervenors, for a rehea ing en banc, filed May 1, 1952, It Is Ordere that the said petitions be, and hereby are denied.

It Is Further Ordered that the petitions o appellees, The Shareholders (as a class cause) o the Long Beach Federal Savings & Loan Associa tion; The Shareholders Protective Committee and Robert H. Wallis; and Title Service Com pany, filed May 1, be, and each of them hereb is denied.

It Is Further Ordered that the mandate o this court in the above-entitled cause be, an hereby is stayed to and including December 3(1952.

U. S. GOVERNMENT PRINTING OFFICE: 1953

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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

Nos. 591, 592, 593, 594, 595, 596 and 658.

MALLONEE, BUCKLIN and FERGUS, SHAREHOLDERS' PROTECTIVE COMMITTEE, and LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, *et al.*,

Petitioners,

vs.

FAHEY, AMMANN, as Conservator, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Respondents.

PETITIONERS' JOINT REPLY TO OPPOSITION TO REHEARING.

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SUBJECT INDEX.

PAGE

I.

Petitions for rehearing en banc before whole Court of Appeals were "serious" and meritorious, yet erroneously denied by a single division 1

II.

Petitions for rehearing en banc were erroneously denied in reliance on now-reversed Court of Appeals' decision..... 3

III.

Intra-circuit conflicts were presented to Court of Appeals in petitions for rehearing en banc, which were denied..... 4

IV.

The right to consideration of petitions for rehearing en banc is not lost by failure of other parties to so petition..... 4

V.

All petitioners have now applied to Court of Appeals for rehearing en banc..... 5

Conclusion 6

TABLE OF AUTHORITIES CITED

CASES	PAGE
Banks Warehouses, Inc. v. Watt, 345 U. S. 932	2, 6, 7
Bradley Mining Co. v. Boice, 345 U. S. 932	2, 6, 7
Western Pac. R. Corp. v. Western Pac. R. Co., 197 F. 2d 1013	3, 5, 6
Western Pac. R. Corp. v. Western Pac. R. Co., 345 U. S. 247	2, 3, 6, 7

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Petitioners,

vs.

FAHEY, AMMANN, as Conservator, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Respondents.

PETITIONERS' JOINT REPLY TO OPPOSITION TO REHEARING.

I.

Petitions for Rehearing En Banc Before Whole Court of Appeals Were "Serious" and Meritorious, Yet Erroneously Denied by a Single Division.

Respondents' opposition asserts that petitioners did not "seriously" seek rehearing *en banc* before the Court of Appeals. But the single panel of the Court of Appeals (which alone denied petitions for rehearing *en banc* by the entire Court), thought such petitions sufficiently "serious" to

devote thereto the opening paragraphs of its Order Denying Petitions For Rehearing to both in Appeals Nos. 12511 and 12591. Each order contains the language:

> "Before: Stephens, Healy and Bone, Circuit Judges.
>
> ". . .
>
> "Upon consideration of the Petitions, . . . for a rehearing *en banc,* . . . It Is Ordered that said petitions be, and hereby are denied." [R. 11684, Apl. 12511.]

The "consideration" referred to, however, was that of the single panel of three judges, *not the whole court.*

Among the subject heads in petitions for rehearing *en banc* were:

> **"Conflicts Between Two Opinions of Court of Appeals in Same Cases."**

The whole Court of Appeals to whom the petitions for rehearing *en banc* were made, never passed on them, on the merits, or otherwise.

That such denial was erroneous cannot be disputed after the reversals only last month by the U. S. Supreme Court in three separate cases[1] of similar erroneous refusal of this same Court of Appeals to consider applications for rehearing *en banc.*

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[1]*Western Pac. R. Corp. v. Western Pac. R. Co.,* 345 U. S. 247; *Bradley Mining Co. v. Boice,* 345 U. S. 932, and *Banks Warehouses, Inc. v. Watt,* 345 U. S. 932.

II.

Petitions for Rehearing En Banc Were Erroneously Denied in Reliance on Now-Reversed Court of Appeals' Decision.

When our petitions for rehearing *en banc* were denied by a single division of the Court of Appeals, the Court followed its prior opinion:

> "From this time forward petitions, if any, for rehearing *en banc* in cases determined by divisions of three judges will be considered and *disposed of* by the latter *as ordinary petitions for rehearing.*" (Emphasis added.)

(*Western Pac. etc.,* 197 F. 2d 1013 at 1016, reversed by the U. S. Supreme Court in *Western Pac. etc.,* 345 U. S. 247.)

By such language, consideration of the demonstrated need for *en banc* rehearings in our cases was prohibited and prevented.

Respondents claim the whole Court of Appeals "delegated responsibility" to the single panel. But the quoted language prevents consideration of the merits of a rehearing *en banc.* The petitions for such rehearing:

> ". . . will be considered and disposed of . . . as *ordinary petitions for rehearing.*" (Emphasis added.)

This is not delegation; it is prohibition. So long as this opinion controlled, no rehearing *en banc* could ever be granted.

III.

Intra-circuit Conflicts Were Presented to Court of Appeals in Petitions for Rehearing En Banc, Which Were Denied.

The intra-circuit conflicts mentioned in petitioners' joint petition for rehearing[2] of denial of certiorari petitions were, together with many *other* intra-circuit conflicts, fully set forth in the various petitions for rehearing *en banc,* filed in the Court of Appeals.

One of the points of the Joint Petition by Long Beach Association and Mallonee, *et al.,* as its Shareholders' Protective Committee, for rehearing *en banc* in Appeal No. 12591, was entitled:

> **"Conflicts Between Two Opinions of Court of Appeals in Same Cases."**

Further itemization of conflicting decisions of the same Court of Appeals, cited and discussed in the various petitions for rehearing *en banc,* would only unduly lengthen this reply.

IV.

The Right to Consideration of Petitions for Rehearing En Banc Is Not Lost by Failure of Other Parties to so Petition.

Respondents seem, by Point III of their opposition, to confuse the *separate* rights of *separate* appellees in TWO unconsolidated appeals, Nos. 12511 and 12591 in the Court below.

Many of petitioners were parties to *one* only of the *two* unconsolidated appeals.

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[2]Filed in U. S. Supreme Court May 18, 1953.

Other petitioners were never parties to either, but sought to protect in the U. S. Supreme Court their rights decided by the Court of Appeals in their absence.

Failure of one, or more, appellees to seek *en banc* rehearing, can in no way prejudice or deny the rights of those petitioners who did file petitions for rehearing *en banc* in the Court of Appeals. Nor can such failure, if any, on the part of one appellee, justify the erroneous denial of other petitioners' right to consideration *on the merits by the whole Court* of Appeals of their timely-filed petitions for rehearing *en banc.*

V.

All Petitioners Have Now Applied to Court of Appeals for Rehearing En Banc.

The inaccuracies of respondents' Point III would require many pages to refute. Most of petitioners, accused by respondents of having failed to file petitions for rehearing, or petitions for rehearing *en banc,* in the Court of Appeals, were parties to one, but not to both, such appeals, and could therefore petition only in one appeal.

Petitioners do not wish to burden the U. S. Supreme Court with all of the complexities of who, among them, were parties appellee to the two unconsolidated appeals in the Court below (Nos. 12511 and 12591), and who did, and did not, petition for either, or both, rehearing, or rehearing *en banc,* by the entire Court of Appeals.

There were a total of eight such petitions in both cases. Some were joint, others separate.

Suffice to say that all petitioners who were overawed by the now-reversed decision of the Court of Appeals in *Western Pac. etc.* (197 F. 2d 1013), and therefore did

not file petitions for *en banc* rehearing, have now dispatched their joint "Petition for Leave to File Motions for Orders: 1. To Vacate Order Denying Appellees' Petitions for Rehearing *En Banc,* and 2. To Permit Filing of Petitions for Rehearing *En Banc* by Appellees who did not Previously so File" to the Clerk of that Court, at San Francisco, California.

All petitioners joined in the joint petition for rehearing of denial of certiorari petitions filed by them in the U. S. Supreme Court on May 18, 1953, after the decision by this Court of *Western Pac. R. Corp. v. Western Pac. R. Co.,* since reported in 345 U. S. 247, and *Bradley Mining Co. v. Boice,* 345 U. S. 932, and *Banks Warehouses, Inc. v. Watt,* 345 U. S. 932, so as to present a single, simple issue to the U. S. Supreme Court.

All petitioners' rights were adversely affected by the now-reversed Court of Appeals' decision of *Western Pac. R. Co.* (197 F. 2d 1013), either by express denial (by a single panel of that Court) of petitions for rehearing *en banc,* or by the effect of the now-reversed decision deterring other petitioners from themselves seeking rehearing *en banc,* from the Court of Appeals.

Conclusion.

The full evils of the now-reversed Court of Appeals' decision of *Western Pac. Co., supra,* can be remedied only by the U. S. Supreme Court in our cases,[3] vacating its orders denying certiorari, granting the respective petitions for writs of certiorari, vacating the orders of the division of the Court of Appeals denying petitions for rehearing

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[3]As it did in *Bradley Mining Co. v. Boice,* 345 U. S. 932.

en banc, and remanding to the Court of Appeals for further proceedings in the light of the U. S. Supreme Court's three decisions of *Western Pac. R. Corp., supra, Bradley Mining Co. v. Boice, supra,* and *Banks Warehouses v. Watt, supra,* with leave to those petitioners, who did not previously file, to now file their petitions for rehearing *en banc,* and for the Court of Appeals to consider such petitions in the light of the three said U. S. Supreme Court decisions.

Respectfully submitted,

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